Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

(9)

No. 99-1978

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

JUDGE TERRY J. HATTER, JR., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

JOINT APPENDIX

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PETITION FOR A WRIT OF CERTIORARI FILED: June 8, 2000
CERTIORARI GRANTED: Oct. 16, 2000

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Order allowing certiorari (Oct. 16, 2000) 143

NOTICE

The following items have been omitted in printing this appendix because they appear on the following pages in the printed appendix to the petition for a writ of certiorari:

Initial decision of United States Claims Court on jurisdiction (Nov. 9, 1990) 12a

Opinion of United States Court of Appeals for the Federal Circuit, reversing United States Claims Court on jurisdiction (Jan. 16, 1992) 19a

Opinion of Court of Federal Claims on merits (June 22, 1994) 30a

Opinion of United States Court of Appeals for the Federal Circuit, reversing Court of Federal Claims on merits (Aug. 30, 1995) 54a

Order of United States Court of Appeals for the Federal Circuit, denying rehearing and rehearing en banc (Dec. 26, 1995) 67a

Order of Supreme Court affirming for lack of quorum (Oct. 7, 1996) 69a

Opinion of Court of Federal Claims on issues of limitation and damages (June 6, 1997) 70a

Opinion of United States Court of Appeals for the Federal Circuit, reversing in part Court of Federal Claims (Aug. 5, 1999) 112a

Order of United States Court of Appeals for the Federal Circuit, granting and denying petitions for rehearing and rehearing en banc and vacating panel's decision (Dec. 20, 1999) 128a

En banc opinion of United States Court of Appeals for the Federal Circuit (Feb. 9, 2000) 1a

DOCKET ENTRIES: United States Claims Court

DATE	PROCEEDINGS
Dec 29 1989	Filing fee of $120 paid by plaintiffs.
Dec 29 1989	Notice of assignment to Judge James T. Turner filed. Copy to parties.
Jan 8 1990	Defendant's notice of appearance filed. Service: 1/8/90.
Feb 22 1990	Defendant's motion for enlargement of time (to April 13, 1990) to respond to complaint filed. Service: 2/21/90. Granted: FEB. 26 1990.
Mar 19 1990	Defendant's precipe filed. Service: 3/19/90.
Apr 13 1990	Defendant's motion for more definite statement filed. Service: 4/13/90. Moot: May 3 1990.
Apr 26 1990	Plaintiffs' opposition to motion for more definite statement filed. Service: 4/26/90.
May 2 1990	Defendant's reply to opposition to motion for more definite statement filed. Service: 5/2/90 by hand.
May 15 1990	Defendant's motion to dismiss pursuant to Rule 12(b) filed. Service: 5/14/90.
May 30 1990	Defendant's motion for enlargement of time (to July 2, 1990) to respond to motion to dismiss filed.

DOCKET ENTRIES: United States Claims Court

	Service: 5/30/90 by hand. Granted: Jun 1 190.
Jul 5 1990	Plaintiff's motion for summary judgement; plaintiffs' brief in support of motion for summary judgement; and plaintiffs' proposed findings of uncontroverted fact filed by leave of the judge. Service: 7/2/90.
Jul 10 1990	Plaintiff's motion for leave to file the original signed copy of the declaration of Judge Norman C. Roettger, Jr. filed. Service: 7/10/90. Allowed: Jul 12 1990.
Jul 12 1990	Declaration of Norman C. Roettger, Jr. filed.
Jul 31 1990	Defendant's motion for enlargement of time (to August 13, 1990) to respond to motion for summary judgement and opposition to motion ot dismiss filed. Service: 7/30/90. Granted: AUG 1 1990.
Aug 13 1990	Defendant's motion for enlargement of time (to August 16, 1990) to respond to motion for summary judgement, etc. filed. Service: 8/13/90. Granted: Aug 16 1990.
Aug 20 1990	Defendant's reply to opposition to motion to dismiss; and response to motion for summary judgement filed. Service: 8/20/90.

DOCKET ENTRIES: United States Claims Court

Aug 20 1990	Defendant's Statement of genuine issues filed. Service: 8/20/90.
Aug 22 1990	Plaintiffs' motion for enlargement of time (to Sept. 17, 1990) to file its reply brief filed. Service: 8/22/90. Granted: 8/22/90.
Sept 5 1990	Defendant's notice of new legal authority filed by leave of the Judge. Service: 8/31/90.
Sept 17 1990	Plaintiffs' reply brief filed. Service: 9/17/90.
Oct 11 1990	Order entered scheduling oral argument. Copy to parties.
Nov 9 1990	Judge's opinion and order filed. Copy to parties.
Nov 13 1990	Judgement entered dismissing complaint with no costs. Copy to parties. VACATED BY ORDER ENTERED MAR 30 1992.
Nov 19 1990	Transcript of proceedings (1 volume) taken at Washington, D.C., on November 9, 1990 filed. Notice to parties.
Dec 11 1990	Transcript of proceedings (1 Volume) taken at Washington, D.C., on November 9, 1990 field. Notice to parties.
Jan 10 1991	Plaintiffs' notice of appeal filed. Copy to defendant and C.A.F.C.

	[$105 fee paid]. C.A.F.C. No. 91-5039.
Mar 6 1992	Mandate of the C.A.F.C., dated March 5, 1992, reversing decision and remanding case back to Claims Court filed. Copy to Judge.
Mar 30 1992	Order entered vacating judgement of 11/13/90. Copy to parties.
Mar 30 1992	Joint status report filed by leave of the Judge.
Jun 3 1992	Plaintiffs' motion for leave to file first amended complaint filed. Service by hand: 6/3/92. Granted: Jun 25 1992
Jun 5 1992	Plaintiffs' status report filed. Service: 6/5/92.
Jun 5 1992	Defendant's status report filed. Service: 6/5/92.
Jun 17 1992	Defendant's response to plaintiffs' motion for leave filed. Service: 6/17/92.
Jun 19 1992	Order entered scheduling status conference. Copy to parties.
Jun 25 1992	Plaintiffs' amended complaint filed.
Jun 25 1992	Plaintiffs' notice of (10) additional plaintiffs filed.
Aug 5 1992	Order entered scheduling a status conference. Copy to parties.

Sep 2 1992	Transcript of proceedings (1 volume) taken at Washington, D.C. on August 5, 1992 filed. Notice to parties.
Sep 29 1992	Order entered rescheduling the status conference. Copy to parties.
Nov 5 1992	Order entered directing the parties to file a joint status report on March 1, 1993 provided that a dispositive motion has not been filed by that date. Copy to parties.
Nov 20 1992	Transcript of proceedings (1vol.) taken at Washington, D.C. on November 5, 1992, filed. Notice to parties.
Dec 11 1992	Plaintiffs' notice of additional plaintiffs (2) filed. Service by hand: 12/11/92.
Dec 11 1992	Plaintiffs' motion for leave to file second amended complaint filed. Service: by hand 12/23/92. GRANTED BY ORDER:JAN 11 1993. COPY TO PARTIES
Dec 23 1992	Defendant's response to plaintiffs' motion for leave to file second amended complaint filed. Service: 12/23/92.
Jan 8 1993	Plaintiffs' reply to Defendant's response to motion for leave to file second amended complaint filed. Service: 1/8/93.

DOCKET ENTRIES: United States Claims Court

Jan 11 1993	Plaintiffs' second amended complaint filed.
Mar 1 1993	Defendant's notice of appearance filed. Service 3/1/93
Mar 1 1993	Plaintiffs' status report filed. Service: 3/1/92 by hand.
Mar 1 1993	Defendant's status report filed. Service: 3/1/93
Jun 1 1993	Defendant's motion for leave to file out time its answer to second amended complaint filed. Service: 6/1/93. GRANTED BY ORDER FILED JUN 2 1993. Copy to parties.
Jun 2 1993	Defendant's answer to second amended complaint filed. Service: 6/1/93.
Jun 14 1993	Defendant's notice of appearance filed. Service: 6/14/93.
Jul 26 1993	Joint motion for scheduling order filed.
Jul 26 1993	Stipulation of facts filed.
Jul 29 1993	Order entered directing plaintiffs to file their motion for summary judgement on September 1, 1993 [-10/1/93-10/15/93-10/29/93], and scheduling oral argument. Copy to parties.

DOCKET ENTRIES: United States Claims Court

Aug 29 1993	Plaintiffs' motion for substitution of plaintiff Mary M. Arceneaux for the late Bon. George Arceneaux, Jr. filed. Service: 8/30/93.
Aug 30 1993	Defendant's response to motion for substitution of Plaintiff filed. Service: 8/30/93.
Sep 1 1993	Plaintiffs' motion for leave to exceed page limitation filed. Service by hand: 9/1/93. GRANTED BY ORDER: 5/2/93. Copy to parties.
Sep 2 1993	Plaintiffs' motion for summary judgement and brief (two parts) filed by leave of the Judge.
Sep 2 1993	Plaintiffs' proposed findings of uncontroverted fact filed by leave.
Oct 1 1993	Defendant's cross-motion for summary judgement and opposition to plaintiffs' motion for summary judgement filed. Service: 10/1/93.
Oct 1 1993	Defendant's statement of genuine issues filed. Service: 10/1/93.
Oct 1 1993	Defendant's proposed findings of uncontroverted fact in support of cross-motion for summary judgement filed. Service: 10/1/93.
Oct 15 1993	Plaintiff's statement of genuine issues filed. Service: by hand 10/15/93.

Oct 27 1993	Defendant's motion for enlargement of time (to November 1, 1993) to filed its reply brief filed. Service: 10/26/93. GRANTED BY ORDER ENTERED OCT 28 1993. Copy to parties. [as]
Nov 1 1993	Defendant's motion for enlargement of time (to November 5, 1993) to respond in support of its cross-motion for summary judgement filed. Service: 11/5/93. GRANTED BY ORDER ENTERED NOV 9 1993. Copy to parties.
Nov 5 1993	Defendant's motion for leave to exceec page limit (by 18 pages) filed. Service: 11/5/93. GRANTED BY ORDER ENTERED NOV 9 1993. Copy to parties. [as]
Nov 8 1993	Defendant's motion for leave to substitute corrected copies of reply memorandum filed. Service: 11/8/93. MOOT BY ORDER ENTERED NOV 9 1993. Copy to parties. [as]
Nov 9 1993	Defendant's reply memorandum in support of its cross-motion for summary judgement filed. Service: 11/8/93. [as]
Nov 15 1993	Plaintiff's motion to supplement record filed. Service by hand: 11/12/93. [as]

Nov 15 1993	Plaintiff's motion to compel Defendant to produce certain relevant documents filed. Service by hand: 11/12/93. [as]
Nov 15 1993	Defendant's response to Plaintiff's motion to supplement record filed. Service: 11/15/93. [as]

REOPEN

UNITED STATES COURT OF FEDERAL CLAIMS
(U.S.C.F.C.)

Civil Docket No. 89-CV-705

TERRY J. HATTER, JR., JUDGE, GEORGE ARCENEAUX, JR., JUDGE, PETER H. BEER, JUDGE, DUDLEY H. BOWEN, JR., JUDGE, A. J. MCNAMARA, JUDGE, HARRY PREGERSON, JUDGE, RAUL A. RAMIREZ, JUDGE, NORMAN C. ROETTGER, JR., JUDGE, THOMAS A. WISEMAN, JR., CHIEF JUDGE, DELORES LEE BURCIAGA, PLAINTIFF

v.

THE UNITED STATES, DEFENDANT

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
12/29/89	1	COMPLAINT FILED. FILING FEE $ 120 Answer due on 2/27/90 (mm) [Entry date 11/22/93]
		* * * * *
6/25/92	3	NOTICE of (10) additional plaintiffs filed by ALL PLAINTIFFS. Service: 6/25/92 (mm) [Entry date 11/22/93]
12/11/92	4	NOTICE of (2) additional plaintiffs filed by ALL PLAINTIFFS

DATE	DOCKET NUMBER	PROCEEDINGS
		Service: 12/11/92 (mm) [Entry date 11/22/93]
6/22/94	20	PUBLISHED DECISION entered denying plaintiff's motion for summary judgment, granting defendant's cross-motion for summary judgment, and directing entry of judgment in favor of defendant (signed by Judge James T. Turner). Copy to parties. (tw) [Entry date 06/24/94]
6/24/94	21	JUDGMENT entered pursuant to Rule 58 dismissing the complaint. Each party shall bear its own costs (signed by Clerk). Copy to parties. (tw) [Entry date 06/27/94]
6/24/94	—	Case closed. (tw) [Entry date 06/27/94]
7/18/94	22	NOTICE OF APPEAL by ALL PLAINTIFFS. Copy to defendant, Judge and to C.A.F.C. FILING FEE $ 105.00, RECEIPT # 037187. (hw) [Entry date 07/20/94]
7/26/94	—	CAFC Case Number Re: [22-1] appeal by ALL PLAINTIFFS CAFC NUMBER: 94-5139. (hw)
1/3/96	23	MANDATE (certified copy) from CAFC dated January 2, 1996,

DATE	DOCKET NUMBER	PROCEEDINGS
		reversing the [21-1] judgment order. (hw) [Entry date 02/15/96]
5/6/96	37	ORDER Staying all proceedings until all matters pertaining proceedings in the Supreme Court are finally resolved (signed by Judge James T. Turner). Copy to parties. (hw) [Entry date 05/10/96]
		* * * * *
10/11/96	38	ORDER lifting 5/6/96 Stay of proceedings, and directing plaintiffs' to file any motion for summary judgment by 11/15/96, (if motion is desired) with defendant's response and plaintiff's reply, if any, shall be filed within the times permitted by RCFC 83.2(c). (signed by Judge James T. Turner) Copy to parties. (hw) [Entry date 10/15/96]
		* * * * *
11/12/96	40	MOTION by ALL PLAINTIFFS (Service BY HAND: 11/12/96 Summary Judgment. Response due: 12/10/96 (as) [Entry date 11/15/96]
		* * * * *
12/18/96	43	CROSS MOTION by USA (Service: 12/16/96) and RESPONSE to [40-1] motion for Summary Judgment by ALL PLAINTIFFS by leave of the Judge. Response due: 1/16/97. (as) [Entry date 12/23/96]

DATE	DOCKET NUMBER	PROCEEDINGS
		* * * * *
1/16/97	46	RESPONSE by ALL PLAINTIFFS (Service: 1/16/97) to [43-1] cross motion. Reply due: 2/3/97 (as) [Entry date 01/22/97]
		* * * * *
2/25/97	53	REPLY by USA to response to [43-1] cross motion. Service 2/20/97 (as) [Entry date 03/04/97]
		* * * * *
6/6/97	56	PUBLISHED DECISION (signed by Judge James T. Turner). Copy to parties. (ds) [Entry date 06/09/97]
		* * * * *
6/11/97	57	JUDGMENT entered pursuant to Rule 58 in accordance with section IX (pp. 31-32 of the court's opinion and order filed June 6, 1997. (See file) (signed by Clerk). Copy to parties. (tw) [Entry date 06/12/97]
		* * * * *
6/11/97	--	Case closed (tw) [Entry date 06/12/97]
		* * * * *
6/12/97	58	NOTICE OF APPEAL by ALL PLAINTIFFS. Copy to USA, Judge Turner and to CAFC. FILING FEE $ 105.00; RECEIPT # 043704. (hw) [Entry date 06/16/97]

DATE	DOCKET NUMBER	PROCEEDINGS
6/13/97	59	CERTIFIED TRANSCRIPT OF JUDGMENT forwarded to attorney of record. See letter in file. (tw) [Entry date 07/22/97]
6/23/97	--	CAFC Case Number Re: [58-1] appeal by ALL PLAINTIFFS. CAFC NUMBER: 97-5093. (hw) [Entry date 07/08/97]
8/8/97	60	NOTICE OF CROSS-APPEAL by USA. Copies to Judge Terry J. Hatter, Jr., et al., Judge Turner and CAFC. Fee not required. (hw) [Entry date 08/12/97]
8/14/97		CAFC Case Number Re: [60-1] appeal by USA CAFC NUMBER: 97-5123 (hw) [Entry date 08/19/97]
10/27/97	61	MANDATE (certified copy) from CAFC dated 10/27/97 dismissed [60-1] appeal by USA. (hw) [Entry date 11/19/97]
		* * * * *
4/20/00	64	MANDATE-(certified copy) from CAFC dated April 20, 2000 reversing the k [57-1] judgment order. (hw) [Entry date 04/21/00]

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

TERRY J. HATTER, JR., JUDGE, ET AL., PLAINTIFFS

v.

THE UNITED STATES, DEFENDANT

DOCKET ENTRIES

DATE	PROCEEDINGS AND ORDERS
January 10, 1991	Notice of appeal filed by Plaintiffs in the US Clms court. (1p)
January 11, 1991	Notice of appeal and certified list, received. (1p) COUNSEL FOR THE APPELLANT: Steven S. Rosenthal (tth) MOB ___ BAS ____ _____ COUNSEL FOR THE APPELLEE: Terrence S. Hartman MOB ___ BAS ____ _____
September 13, 1991	ARGUED. (Archer, Plager and Rader, JJ) (tth)
January 16, 1992	REVERSED AND REMANDED. (Rader, J) "JUDGMENT ENTERED" (jb) F2nd 953-626
July 18, 1994	Notice of appeal filed by Plantiffs in the US Ct. of Fed. Claims.
July 20, 1994	Notice of appeal and certified list, received. (cs)

March 8, 1995	Submitted after ORAL ARGUMENT by Steven S. Rosenthal and Jeanne E. Davidson
94-5139 (PAM)	(ARCHER, PLAGER AND RADER)
August 30, 1995	REVERSED AND REMANDED. (Rader, J) "JUDGEMENT ENTERED" EACH PARTY SHALL BEAR ITS OWN COSTS. (Pjt) 64 F3D 647
	14. Appellee - MOTION FOR A 30-DAY EXTENSION OF TIME, TO AND INCLUDING NOVEMBER B.A.V., 1995, WITHIN WHICH TO FILE A PETITION FOR REHEARING AND SUGGESTION FOR REHEARING IN BANC. (MS-10/06/95) FILED: 10/06/95. ON CONSENT. ACTION ON MOTION (15): GRANTED. BY CLERK. FILED: 10/10/95. (EOD 10/18/95 BY JB) 94-5139
	APPELLEE- COMBINED PETITION FOR REHEARING AND SUGGESTION FOR REHEARING IN BANC (MS-11/13/95) FILED: 11/13/95 PETITION CIRCULATED: 11/14/95 SUGGESTION CIRCULATED: 11/27/95 RESPONSE REQUESTED FROM: APPELLANT (HATTER, ET AL.) RESPONSE DUE: 12/12/95 RESPONSE FILED: 12/12/95 RESPONSE CIRCULATED: 12/13/95 PETITION/SUGGESTION: DENIED/DECLINED ON 12/26/95. (EOD 12/26/95 BY AV) 94-5139
January 2, 1996	ISSUED AS A MANDATE TO THE US COURT OF FEDERAL CLAIMS. (1p)
	16. PETITION FOR WRIT OF CER-

DATE	PROCEEDINGS AND ORDERS
	TIORARI FILED 04/24/96, SUPREME COURT #: 95-1733. CERT. DENIED ON 10/07/96. U.S.L.W.: 64-3741 (EOD 10/08/96 BY CS) 94-5139

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Civil Docket No. 89-CV-705
CHIEF JUDGE MICHAEL M. MIHM; CHIEF JUDGE TERENCE T, EVANS; CHIEF JUDGE THOMAS A. WISEMAN, JR.; CHIEF JUDGE WILBUR D. OWENS, JR.; DOLORES LEE BURCIAGA, EXECUTRIX OF THE ESTATE OF CHIEF JUDGE JUAN G. BURCIAGA, DECEASED; JUDGE A.J. MCNAMARA; JUDGE DUDLEY H. BOWEN, JR.; JUDGE HAROLD A. BAKER; JUDGE HARRY PREGERSON; JUDGE HENRY A. MENTZ, JR.; JUDGE HENRY R. WILHOIT, JR.; JUDGE NORMAN C. ROETTGER, JR.; JUDGE PETER H. BEER; JUDGE RAUL A. RAMIREZ; JUDGE TERRY J. HATTER, JR.; MARY MARTIN ARCENEAUX, ON BEHALF OF THE LATE JUDGE GEORGE ARCENEAUX, JR.; PLAINTIFFS-APPELLANTS

v.

UNITED STATES, DEFENDANT-APPELLEE

DOCKET ENTRIES

DATE	PROCEEDINGS AND ORDERS
April 9, 1998	Submitted after ORAL ARGUMENT by Steven S. Rosenthal and Jeanne E. Davidson.
97-5093 (KSH)	(PLAGER, ARCHER and RADER)
	REVERSED AND REMANDED. PRECEDENTIAL OPINION BY: J. PLAGER. JUDGEMENT ENTERED: 08/05/99. COSTS AGAINST APPELLEE. (EOD 08/05/99 BY KSH) 97-5093
	(Opinion withdrawn with respect to part 3-(Order 12/20/99))

DATE	PROCEEDINGS AND ORDERS
	APPELLEE - COMBINED PETITION FOR REHEARING AND SUGGESTION FOR REHEARING IN BANC [NPF] (MS-09/20/99) FILED: 09/20/99 PETITION CIRCULATED: 09/22/99 SUGGESTION CIRCULATED: 10/05/99 RESPONSE REQUESTED FROM: APPELLANT (JUDGE TERRY J. HATTER, ET AL.) RESPONSE DUE: 10/20/99 RESPONSE FILED: 10/20/99 RESPONSE CIRCULATED: 10/21/99 PETITION/ SUGGESTION: DENIED/ DECLINED ON 11/04/99. (EOD 11/04/99 BY GYK) 97-5093
	Order issued in error and vacated on 11/5/99.
	APPELLANTS - COMBINED PETITION FOR REHEARING AND SUGGESTION FOR REHEARING IN BANC [NPF] (HS-09/20/99) FILED: 09/20/99 PETITION CIRCULATED: 09/22/99 SUGGESTION CIRCULATED: 10/05/99 RESPONSE REQUESTED FROM: APPELLEE (U.S.) RESPONSE DUE: 10/20/99 RESPONSE FILED: 10/20/99 RESPONSE CIRCULATED: 10/21/99 PETITION/SUGGESTION: DENIED/DECLINED ON 11/04/99. (EOD 11/04/99 BY GYK) 97-5093

DATE	PROCEEDINGS AND ORDERS
	Order issued in error and vacated on 11/5/99.
	APPELLANTS - COMBINED PETITION FOR REHEARING AND SUGGESTION FOR REHEARING IN BANC [NPF] (HS-09/20/99) FILED: 09/20/99 PETITION CIRCULATED: 09/22/99 SUGGESTION CIRCULATED: 10/05/99: RESPONSE REQUESTED FROM: APPELLEE (U.S.) RESPONSE DUE: 10/20/99 RESPONSE FILED: 10/20/99 RESPONSE CIRCULATED: 10/21/99 PETITION/SUGGESTION: DENIED/GRANTED ON 12/20/99. (EOD 12/20/99 BY AV) 97-5093
	APPELLEE - COMBINED PETITION FOR REHEARING AND SUGGESTION FOR REHEARING IN BANC [NPF] (MS-09/20/99) FILED: 09/20/99 PETITION CIRCULATED: 09/22/99 SUGGESTION CIRCULATED: 10/05/99 RESPONSE REQUESTED FROM: APPELLANT (JUDGE TERRY J. HATTER, ET AL.) RESPONSE DUE: 10/20/99 RESPONSE FILED: 10/20/99 RESPONSE CIRCULATED: 10/21/99 PETITION/SUGGESTION: DENIED/DENIED ON 12/20/99. (EOD 12/20/99 BY AV) 97-5093
	16. ORDERED: THE CT. ORDERS

	ISSUED ON 11/4/99 DENYING THE APPELLANTS' & APPELLEE'S REHEARING REQUESTS WERE ISSUED IN ERROR, & ARE VACATED. ALL REHR.ING REQUESTS ARE STILL PENDING. BY: CLERK. (CS-11/05/99) FILED: 11/05/99 (EOD 11/05/99) (AV) 97-5093
	17. ORDERED: THE JUDGMENT OF THE CT. ENTERED ON 8/5/99 IS VACATED & THE OPINION OF THE CT. ACCOMPANYING THE JUDGMENT IS WITHDRAWN W/RESPECT TO PART 3. ADDITIONAL BRIEFING & ARGUMENT ARE NOT INDICATED AT THIS TIME. BY: COURT-EN BANC. (CS-12/20/99) FILED: 12/20/99 (EOD 12/20/99) (AV) 97-5093
	18. ORDERED: THE JUDGMENT OF THE COURT ENTERED ON 8/5/99 IS REINSTATED (THE OPINION REMAINS IN EFFECT AS TO PARTS 1 & 2). THE OPINION OF THE COURT EN BANC ISSUED TODAY SUPERCEDES PART 3 OF THAT OPINION. BY: CLERK. (PRECEDENTIAL ORDER) (CS-02/09/00) FILED: 02/09/00 (EOD 02/10/00) (AV) 97-5093
	REVERSED AND REMANDED. PRECEDENTIAL OPINION BY: J. PLAGER. JUDGMENT ENTERED: 02/09/00. COSTS AGAINST APPELLEE. (EOD 02/09/00 BY AVV) 97-5093

PETITION FOR WRIT OF CERTIORARI FILED 06/08/00. SUPREME COURT #: 99-1978. (EOD 07/13/00 BY BG) 97-5093

PETITION FOR WRIT OF CERTIORARI FILED 06/08/00. SUPREME COURT #: 99-1978. CERT. GRANTED ON 10/16/00. (EOD 10/17/00 BY BG) 97-5093

UNITED STATES COURT OF FEDERAL CLAIMS

Civil Docket No. 705-89 C

JUDGE TERRY J. HATTER, JR., JUDGE GEORGE ARCENEAUX, JUDGE PETER H. BEER; JR., JUDGE DUDLEY H. BOWEN, JR., JUDGE JUAN G. BURCIAGA, JUDGE A.J. MCNAMARA; JUDGE HARRY PREGERSON, JUDGE RAUL A. RAMIREZ, JUDGE NORMAN C. ROETTGER, JR., CHIEF JUDGE THOMAS A. WISEMAN, JR., PLAINTIFFS,

v.

THE UNITED STATES OF AMERICA, DEFENDANT.

COMPLAINT

Plaintiffs (1) Judge Terry J. Hatter, Jr., (2) Judge George Arceneaux, Jr., (3) Judge Peter H. Beer, (4) Judge Dudley H. Bowen, Jr., (5) Judge Juan G. Burciaga, (6) Judge A.J. McNamara, (7) Judge Harry Pregerson, (8) Judge Raul A. Ramirez, (9) Judge Norman C. Roettger, Jr., and (10) Chief Judge Thomas A. Wiseman, Jr. complain against The United States of America and allege as follows:

Nature of the Case

1. This is an action for damages pursuant to Article III, Section 1, of the Constitution of the United States and pursuant to plaintiffs' contracts of employment. This claim arises because the United States has diminished the compensation of Article III judges appointed prior to January 1, 1984 by reason of the Social Security Amendments of 1983, Public Law 98-21, and related statutes.

Jurisdiction

2. This Court has jurisdiction over this action pursuant to 28 U.S.C § 1491(a)(1). The individual claim of each plaintiff exceeds ten thousand dollars ($10,000).

Parties

3. Plaintiff (1) Terry J. Hatter, Jr. serves as a judge of the United States District Court for the Central District of California and was appointed on December 20, 1979.

4. Plaintiff (2) George Arceneaux, Jr. serves as a Judge of the United States District Court for the Eastern District of Louisiana and was appointed on September 26, 1979.

5. Plaintiff (3) Peter H. Beer serves as a Judge of the United States District Court for the Eastern District of Louisiana and was appointed on November 27, 1979.

6. Plaintiff (4) Dudley H. Bowen, Jr. serves as Judge of the United States District Court for the Southern District of Georgia and was appointed on November 27, 1979.

7. Plaintiff (5) Juan G. Burciaga serves as Judge of the United States District Court for the District of New Mexico and was appointed on November 2, 1979.

8. Plaintiff (6) A.J. McNamara serves as a Judge of the United States District Court for the Eastern District of Louisiana and was appointed on June 21, 1982.

9. Plaintiff (7) Harry Pregerson serves as a Judge of the United States Court of Appeals for the Ninth Circuit and was appointed on November 2, 1979.

10. Plaintiff (8) Raul A. Ramirez serves as a Judge of the United States District Court for the Eastern District of California and was appointed on May 23, 1980.

11. Plaintiff (9) Norman C. Roettger, Jr. serves as a Judge of the United States District Court for the Southern District of Florida and was appointed on June 2, 1972.

12. Plaintiff (10) Thomas A. Wiseman, Jr. serves as Chief Judge of the United States District Court for the Middle District of Tennessee and was appointed on August 11, 1978.

13. The Defendant is the United States of America, which is responsible for assuring that plaintiffs' compensation is not diminished "during their Continuance in Office."

Background

14. Each of the plaintiffs is an Article III judge appointed to his present office by the President of the United States with the advice and consent of the United States Senate pursuant to Article II, Section 2, of the Constitution of the United States. Each of the plaintiffs was appointed prior to April 20, 1983 and has served continuously as a federal judge from date of appointment to the present date.

15. At the time each plaintiff was appointed an Article III judge, the terms and conditions of employment, as determined by statute, permitted an Article III judge to retire after meeting certain age and service requirements and to receive an annuity for the remainder of his lifetime equal to his salary at the time of retirement. An Article III judge may alternatively retire from active service, thereby retaining his office and the salary of the office, including any increases thereof.

16. The Social Security Amendments of 1983, Public Law 98-21, extended Social Security coverage to many previously uncovered civilian employees of the federal government. By defining Article III judges as "employees" under the Social Security Act, this statute required for the first time that social security deductions be made from wages received by Article III judges, which constitute a part of their compensation. 42 U.S.C. § 410(a)(5)(E). Either as a result of these deductions, or as a result of defendant's failure to increase plaintiffs' salaries by the amount of these deductions, defendant has diminished plaintiffs' compensation.

17. Subsequent statutes, such as the Federal Employees' Retirement Contribution Temporary Adjustment Act of 1983, Public Law 98-168, and the Federal Employees' Retirement System Act of 1986, Public Law 99-335, gave federal employees other than Article III judges certain elections regarding retirement salary deductions and retirement systems. Article III judges, however, received no relief under these statutes. For example, Article III judges were not given the right granted other federal employees to opt out of the Social Security system.

Count I: Constitution Violation

18. Paragraphs 1-17 are incorporated herein.

19. Article III, Section 1, of the Constitution of the United States provides in pertinent part that Article III judges "shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."

20. The defendant, by virtue of Public Law 98-21, unlawfully diminished and continues to diminish plaintiffs' compensation in violation of Article III, Section 1, of the Constitution of the United States from January 1, 1984 to the present time. This diminution was discriminatory. Each plaintiff is, therefore, entitled to damages in the amount by which his compensation has been diminished.

Count II: Breach of Contract

21. Paragraphs 1-17 are incorporated herein.

22. Article III, Section 1, of the Constitution of the United States and the statutes in effect at the time plaintiffs assumed their offices constitute a contract of employment between plaintiffs and defendant, under which defendant agrees not to

diminish plaintiffs' compensation "during their Continuance in Office."

23. The defendant, by virtue of Public Law 98-21, breached its contract with plaintiffs by unlawfully diminishing and continuing to diminish plaintiffs' compensation from January 1, 1984 to the present time. Each plaintiff is, therefore, entitled to damages in the amount by which their compensation has been diminished.

Prayer for Relief

WHEREFORE, plaintiffs respectfully request that judgment be entered:

A. Awarding each plaintiff damages in the amount by which their compensation has been diminished from January 1, 1984 to the date of judgment.

B. Awarding plaintiffs such further relief as this Court deems just and appropriate.

Respectfully submitted,

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Attorneys for Plaintiffs

Dated: December 29, 1989

UNITED STATES CLAIMS COURT

Civil Docket No. 705-89 C

JUDGE TERRY J. HATTER, et al., Plaintiffs,

v.

THE UNITED STATES, Defendant.

TRANSCRIPT OF PROCEEDINGS
NOVEMBER 9, 1990

[p. 38, line 14] THE COURT: I think you have certainly addressed it. Let me ask you about one other aspect. My recollection is that at the same time that the Social Security tax became applicable to judges on January, 1984, a COLA also went into effect, which was more than off-setting, that is, that if Social Security taxes took out more than $3,000, then the COLA increased their annual salaries by somewhat more than that.

MR. ROSENTHAL: Actually, the COLA didn't go into effect simultaneously.

THE COURT: One month later?

MR. ROSENTHAL: My recollection is that it didn't [39] go into effect until nine-months later and it was retroactive. That issue is dealt with expressly by the Supreme Court in *Booth v. The United States*, that you can't somehow compensate for diminution in the past on the basis of some increase in salary in the future.

THE COURT: You say that's the holding in *Booth*? How did Congress ever—let's say that Congress took your position and said that we have violated the Constitution, we have unlawfully diminished these salaries. Let us give them a raise that will off-set that. Are you saying they can do that?

MR. ROSENTHAL: If it had expressly given a raise for the purpose of compensation, I think if the intent was to

expressly increase the salaries of the federal judges for this diminution.

THE COURT: You could see where I was coming from. The fact that the judges are making $3,000 more a year than they were in 1984, that doesn't do the government any good. There is still a diminution every month and the judge is entitled to it?

MR. ROSENTHAL: That's right. As a factual matter, we don't have a simultaneous increase. We do have a subsequent increase that takes place. I am not saying our claim couldn't be compensated for by the payment of whatever was due for the past periods, but a general increase in the [40] salaries does not undo the claim itself.

THE COURT: Why is that? The claim was diminished, let's say I'll concede, and then later there was an increase to bring the judge back up to where he was.

MR. ROSENTHAL: Because the general increase was just that, a general increase. It was not intended to compensate for the particular diminution that took place in this case.

The fact of the matter is that these judges continue to be 5, 10, 15 percent behind where they would have been. Even today, if you take a snapshot today, whatever the judges are earning, let's say it's $100,000, is subject to a $10,000 deduction for the Social Security claim. What you would have is a rolling problem which would go on ad infinitum with respect to these claims. I don't think that the Supreme Court has ever held—my recollection of *Booth* and I am going to have to look at it again, is that argument was made by the judges in *Booth* and the Supreme Court—I am virtually confident that the Supreme Court directed that a subsequent increase in salary doesn't answer the problem of a diminution in the past.

THE COURT: I understand your position that this 1984 Social Security tax [is not]* exactly simultaneous with the

*The parties agree that these words were inadvertently omitted from the transcript.

raise. Suppose it had been? Suppose Congress put the judges under a Social Security tax and then, without saying [41] what it was for, gave them a raise or say they were giving to the old judges and it would apply subsequently, and it happened to be the same amount that the tax was going to take, is that salary being diminished in violation of the Constitution?

MR. ROSENTHAL: I think there would have to be some indicia, that the intent was to compensate for this particular deduction. If what they did was they increased—in point of fact, we don't have that case here. The Congress did not—interestingly enough, as it turns out, it occurred exactly the opposite. Congress did [not]* compensate on the facts of this case.

*The parties agree that these words were inadvertently omitted from the transcript.

UNITED STATES COURT OF FEDERAL CLAIMS

Civil Docket No. 705-89 C

JUDGE TERRY J. HATTER, et al., Plaintiffs,

v.

THE UNITED STATES, Defendant.

SECOND AMENDED COMPLAINT

Plaintiffs (1) Judge Terry J. Hatter, Jr., (2) Judge George Arceneaux, Jr., (3) Judge Peter H. Beer, (4) Judge Dudley H. Bowen, Jr., (5) Chief Judge Juan G. Burciaga, (6) Judge A.J. McNamara, (7) Judge Harry Pregerson, (8) Judge Raul A. Ramirez, (9) Judge Norman C. Roettger, Jr., (10) Chief Judge Thomas A. Wiseman, Jr., (11) Chief Judge Terence T. Evans, (12) Judge Henry A. Mentz, Jr., (13) Chief Judge Wilbur D. Owens, Jr., (14) Judge Henry R. Wilhoit, Jr., (15) Chief Judge Harold A. Baker, and, (16) Judge Michael M. Mihm complain against The United States of America and allege as follows:

Nature of the Case

1. This is an action for damages pursuant to Article III, Section 1, of the Constitution of the United States and pursuant to plaintiffs' contracts of employment. This claim arises because the United States has diminished the compensation of Article III judges appointed prior to January 1, 1983 by reason of the Tax Equity and Fiscal Responsibility Act of 1982, Public Law 97-248, and the Social Security Amendments of 1983, Public Law 98-21, and related statutes.

Jurisdiction

2. This Court has jurisdiction over Counts I and III of this action pursuant to 28 U.S.C § 1491(a)(1). See *Hatter v. United*

States, 953 F.2d 626 (Fed. Cir. 1992). The individual claim of each plaintiff exceeds ten thousand dollars ($10,000).

3. This Court has jurisdiction over Count II of this action pursuant to 28 U.S.C. § 1346(a)(1).

Parties

4. Plaintiff (1) Terry J. Hatter, Jr. serves as Judge of the United States District Court for the Central District of California and was appointed on December 20, 1979.

5. Plaintiff (2) George Arceneaux, Jr. serves as Judge of the United States District Court for the Eastern District of Louisiana and was appointed on September 26, 1979.

6. Plaintiff (3) Peter H. Beer serves as Judge of the United States District Court for the Eastern District of Louisiana and was appointed on November 27, 1979.

7. Plaintiff (4) Dudley H. Bowen, Jr. serves as Judge of the United States District Court for the Southern District of Georgia and was appointed on November 27, 1979.

8. Plaintiff (5) Juan G. Burciaga serves as Chief Judge of the United States District Court for the District of New Mexico and was appointed on November 2, 1979.

9. Plaintiff (6) A.J. McNamara serves as Judge of the United States District Court for the Eastern District of Louisiana and was appointed on June 21, 1982.

10. Plaintiff (7) Harry Pregerson serves as Judge of the United States Court of Appeals for the Ninth Circuit and was appointed on November 2, 1979.

11. Plaintiff (8) Raul A. Ramirez served as Judge of the United States District Court for the Eastern District of California from his appointment on May 23, 1980 until December 31, 1989.

12. Plaintiff (9) Norman C. Roettger, Jr. serves as Judge of the United States District Court for the Southern District

of Florida and was appointed on June 2, 1972.

13. Plaintiff (10) Thomas A. Wiseman, Jr. serves as Chief Judge of the United States District Court for the Middle District of Tennessee and was appointed on August 11, 1978.

14. Plaintiff (11) Terence T. Evans serves as Chief Judge of the United States District Court for the Eastern District of Wisconsin and was appointed on November 2, 1979.

15. Plaintiff (12) Henry A. Mentz, Jr. serves as Judge of the United States District Court for the Eastern District of Louisiana and was appointed on June 25, 1982.

16. Plaintiff (13) Wilbur D. Owens, Jr. serves as Chief Judge of the United States District Court for the Middle District of Georgia, and was appointed on March 1, 1972.

17. Plaintiff (14) Henry R. Wilhoit, Jr. serves as Judge of the United States District Court for the Eastern District of Kentucky and was appointed on October 23, 1981.

18. Plaintiff (15) Harold A. Baker serves as Chief Judge of the United States District Court for the Central District of Illinois and was appointed on September 23, 1978.

19. Plaintiff (16) Michael M. Mihm serves as Judge of the United States District Court for the Central District of Illinois and was appointed on August 5, 1982.

20. The Defendant is the United States of America, which is responsible for assuring that plaintiffs' compensation is not diminished "during their Continuance in Office."

Background

21. Each of the plaintiffs is or was an Article III judge appointed to his office by the President of the United States with the advice and consent of the United States Senate pursuant to Article II, Section 2, of the Constitution of the

United States. Each of the plaintiffs was appointed prior to August 19, 1982 and has served continuously as a federal judge from date of appointment to the present date with the exception of plaintiff (8), Raul A. Ramirez, who served continuously until his resignation from the federal bench on December 31, 1989.

22. At the time each plaintiff was appointed an Article III judge, the terms and conditions of employment, as determined by statute, permitted an Article III judge to retire after meeting certain age and service requirements and to receive an annuity for the remainder of his lifetime equal to his salary at the time of retirement. An Article III judge may alternatively retire from active service, thereby retaining his office and the salary of the office, including any increases thereof.

23. The Tax Equity and Fiscal Responsibility Act of 1982, Public Law 97-248, and the Social Security Amendments of 1983, Public Law 98-21, extended Social Security coverage to many previously uncovered civilian employees of the federal government. By defining Article III judges as "employees" under the Social Security Act, these statutes required for the first time that hospital insurance and old age survivors and disability insurance deductions be made from wages received by Article III judges, which constitute a part of their compensation. 42 U.S.C. § 410(a)(5)(E). Either as a result of these deductions, or as a result of defendant's failure to increase plaintiffs' salaries by the amount of these deductions, defendant has diminished plaintiffs' compensation.

24. Subsequent statutes, such as the Federal Employees' Retirement Contribution Temporary Adjustment Act of 1983, Public Law 98-168, and the Federal Employees' Retirement System Act of 1986, Public Law 99-335, gave federal employees other than Article III judges certain elections regarding retirement salary deductions and retirement systems. Article III judges, however, received no relief under these statutes. For example, Article III judges were not given the

right granted other federal employees to opt out of the Social Security system.

Count I: Damages for Constitutional Violation

25. Paragraphs 1-24 are incorporated herein.

26. Article 111, Section 1, of the Constitution of the United States provides in pertinent part that Article III judges "shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."

27. The defendant, by virtue of Public Law 97-248 and Public Law 98-21, unlawfully diminished and continues to diminish plaintiffs' compensation in violation of Article III, Section 1, of the Constitution of the United States from January 1, 1983 to the present time. This diminution was discriminatory. Each plaintiff is, therefore, entitled to damages in the amount by which his compensation has been diminished.

Count II: Tax Refund for Constitutional Violation

28. Paragraphs 1-24 are incorporated herein.

29. Article III, Section 1, of the Constitution of the United States provides in pertinent part that Article III judges "shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."

30. The defendant, by virtue of Public Law 97-248 and Public Law 98-21, has imposed taxes upon plaintiffs' compensation in violation of Article III, Section 1, of the Constitution of the United States from January 1, 1983 to the present time. This imposition of taxes upon plaintiffs' compensation was discriminatory. Plaintiffs (1)-(13), therefore, seek refund of taxes unconstitutionally imposed, plus interest.

31. Plaintiffs (1)-(13) have exhausted their administrative remedies pursuant to 26 U.S.C. § 7422(a) and have satisfied the requirements of 26 U.S.C. § 6532(a)(1). Official notices of the Internal Revenue Service's denial of their Claims for Refund or evidence that more than six months have passed since their Claims for Refund were filed are attached to the First Amended Complaint as Exhibits 1-13.

Count III: Breach of Contract

32. Paragraphs 1-24 are incorporated herein.

33. Article III, Section 1, of the Constitution of the United States and the statutes in effect at the time plaintiffs assumed their offices constitute a contract of employment between plaintiffs and defendant, under which defendant agrees not to diminish plaintiffs' compensation "during their Continuance in Office."

34. The defendant, by virtue of Public Law 97-248 and Public Law 98-21, breached its contract with plaintiffs by unlawfully diminishing and continuing to diminish plaintiffs' compensation from January 1, 1983 to the present time. Each plaintiff is, therefore, entitled to damages in the amount by which their compensation has been diminished.

Prayer for Relief

WHEREFORE, plaintiffs respectfully request that judgment be entered:

A. Awarding each plaintiff damages in the amount by which their compensation has been diminished.

B. Alternatively, awarding plaintiffs (1)-(13) a tax refund for the amount of tax unlawfully deducted from each plaintiff's compensation in the years for which each plaintiff has filed Claims for Refund with the Internal Revenue Service.

C. Awarding plaintiffs such further relief as this Court deems just and appropriate.

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Dated: December 11, 1992

UNITED STATES COURT OF FEDERAL CLAIMS

Civil Docket No. 705-89 C

JUDGE TERRY J. HATTER, et al., Plaintiffs,

v.

THE UNITED STATES, Defendant.

JOINT STIPULATIONS

The parties to the above-captioned case stipulate jointly as follows:

1. For purposes of this case:

a. the "Tax Equity Act" refers to the Tax Equity and Fiscal Responsibility Act of 1982, Public Law 97-248, September 3, 1982.

b. the "Social Security Amendments of 1983" refers to Public Law 98-21, April 20, 1983;

c. the "Temporary Adjustment Act" refers to the Federal Employees' Retirement Contribution Temporary Adjustment Act of 1983, Public Law 98-168, November 29, 1983;

d. the "Deficit Reduction Act of 1984" refers to Public Law 98-369, July 18, 1984;

e. "FERS" refers to the Federal Employees' Retirement System;

f. the "FERS Act," refers to the Federal Employees' Retirement System Act, Public Law 99-335, June 6, 1986;

g. "FICA" refers to the Federal Insurance Contributions Act;

h. "CSRS" refers to the Civil Service Retirement System;

i. "HI" refers to Hospital Insurance;

j. "JSAS" refers to the Judicial Survivor's Annuity System;

k. "OASDI" refers to Old Age Survivors' Disability Insurance;

l. the "interim offset plan" refers to the withholding procedures established by § 204 of the Temporary Adjustment Act, 5 U.S.C. § 8331 note;

m. "CSRS Offset" refers to the withholding procedures codified at 5 U.S.C. §§ 8334, 8349.

2. Terry J. Hatter, Jr. was appointed as an Article III judge on December 20, 1979. He has served continuously from at least January 1, 1984 until the present as a United States District Judge for the Central District of California.

3. George Arceneaux, Jr. was appointed as an Article III judge on September 26, 1979. He served continuously from at least January 1, 1984 until April 6, 1993 as a United States District Judge for the Eastern District of Louisiana.

4. Peter H. Beer was appointed as an Article III judge on November 27, 1979. He has served continuously from at least January 1, 1984 until the present as a United States District Judge for the Eastern District of Louisiana.

5. Dudley H. Bowen, Jr. was appointed as an Article III judge on November 27, 1979. He has served continuously from at least January 1, 1984 until the present as a United States District Judge for the Southern District of Georgia.

6. Juan G. Burciaga was appointed as an Article III judge on November 2, 1979. He has served continuously from at least January 1, 1984 until the present as a United States District Judge for the District of New Mexico.

7. A.J. McNamara was appointed as an Article III judge on June 21, 1982. He has served continuously from at least January 1, 1984 until the present as a United States District Judge for the Eastern District of Louisiana.

8. Harry Pregerson was appointed as an Article III judge on December 7, 1967. He has served continuously from at least January 1, 1984 until the present as Circuit Judge on the United States Court of Appeals for the Ninth Circuit.

9. Raul A. Ramirez was appointed as an Article III judge on May 23, 1980. He served continuously from at least January 1, 1984 through December 31, 1989 as a United States District Judge for the Eastern District of California.

10. Norman C. Roettger, Jr. was appointed as an Article III judge on June 2, 1972. He has served continuously from at least January 1, 1984 until the present as a United States District Judge for the Southern District of Florida.

11. Thomas A. Wiseman, Jr. was appointed as an Article III judge on August 11, 1978. He has served continuously from at least January 1, 1984 until the present as a United States District Judge for the Middle District of Tennessee.

12. Terence T. Evans was appointed as an Article III judge on November 2, 1979. He has served continuously from at least June 3, 1986 to the present as a United States District Judge for the Eastern District of Wisconsin.

13. Henry A. Mentz, Jr. was appointed as an Article III judge on June 25, 1982. He has served continuously from at least June 3, 1986 until the present as a United States District Judge for the Eastern District of Louisiana.

14. Wilbur D. Owens, Jr. was appointed as an Article III judge on March 1, 1972. He has served continuously

from at least June 3, 1986 until the present as United States District Judge for the Middle District of Georgia.

15. Henry R. Wilhoit, Jr. was appointed as an Article III judge on October 23, 1981. He has served continuously from at least June 3, 1986 to the present as United States District Judge for the Eastern District of Kentucky.

16. Harold A. Baker was appointed as an Article III judge on September 23, 1978. He has served continuously from at least January 1, 1987 to the present as United States District Judge for the Central District of Illinois.

17. Michael M. Mihm was appointed as an Article III judge on August 5, 1982. He has served continuously from at least January 1, 1987 to the present as United States District Judge for the Central District of Illinois.

18. Social Security Administration data indicates that, as of December 1983, 82.9% of the total labor force (excluding the Armed Forces) and 90.7% of the paid civilian population were covered by Social Security. Social Security Administration data indicates that, as of December 1984, 85.9% of the total labor force (excluding the Armed Forces) and 92.9% of the paid civilian population were covered by Social Security.

19. The Office of Personnel Management (OPM) estimates that as of September 1983, 207,155 civilian federal employees were subject to Social Security, while 2,503,914 civilian federal employees were not subject to Social Security.

20. OPM estimates that as of September 1983 there were 2,690,000 federal employees employed in position categories that the Social Security Amendments of 1983 made subject to Social Security on January 1, 1984 for employees hired for those positions subsequent to December 31, 1983, excluding those persons who returned to federal employment after a separation of

less than 365 days and who had not been subject to Social Security in their earlier government position.

21. According to the Administrative Office of the United States Courts: (1) 644 Article III judges became subject to Social Security on January 1, 1984, as a result of the 1983 Social Security Amendments; (2) 255 Article III judges, who were on senior status, did not become subject to Social Security withholdings because they were considered to be retired; and (3) 677 non-Article III judges became subject to Social Security based upon section 410(a)(5)(E), title 42, United States Code.

22. OPM estimates that as of September 1984, excluding employees of the United States Postal Service, 268,006 civilian federal employees were subject to Social Security and 1,777,247 civilian federal employees were not subject to Social Security.

23. OPM estimates that as of September 1991, 1,415,132 civilian federal employees, were subject to Social Security while 1,523,174 civilian federal employees were not subject to Social Security.

24. Social Security data indicate that as of December 1991, 88.3% of the total labor force (excluding the Armed Forces) and 93.5% of the paid civilian population are covered by Social Security.

25. OPM estimates that as of September 1991 there were 70,920 federal employees first employed prior to 1984 (under CSRS) who had a break in service of more than 365 days, who were rehired after January 1, 1984, and met the requirements of 5 U.S.C. § 8402(b).

26. According to OPM, four percent of the pre-1984 federal employees who were eligible to transfer from CSRS to FERS opted to do so. The remaining 96 percent of eligible employees opted to retain CSRS coverage only.

27. Attached to these stipulations is the following referenced table published by the U.S. Department of Health and Human Services, Social Security Administration in the Social Security Bulletin, Annual Statistical Supplement, 1987. The parties stipulate that the table is a true and correct copy of the material published in the 1987 Supplement.

Table 4.	Labor force and estimated workers covered under social insurance programs, 1939-86.

28. Attached to these stipulations are the following referenced tables published by the U.S. Department of Health and Human Services, Social Security Administration in the Social Security Bulletin, Annual Statistical Supplement, 1992. The parties stipulate that the tables are true and correct copies of the materials published in the 1992 Supplement.

Table 2.A3.	Annual maximum taxable earnings and actual contribution rates, 1937-93 and thereafter.
Table 2.A4.	Maximum annual amount of contribution, 1937-93.
Table 3.B1.	Labor force and estimated workers covered under social insurance programs, 1960-91.

29. Attached to these stipulations are copies of sections 01901.612, 01901.614, and 01901.616 from the Social Security Administration's Program Operations Manual System. The parties stipulate that the attached materials are true and correct copies of the published materials.

The parties submit these joint stipulations without prejudice to their ability to enter into additional joint stipulations or to the ability of either party to submit proposed findings of fact.

Respectfully submitted,

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Date: 23 July 1993

Table 4.—Labor force and estimated workers covered under social insurance programs, 1939-86

[In millions]

Employment and coverage status	1939 [1]	1949 [1]	1960	1970	1980	1983	1984	1985	1986
Total labor force	55.6	63.7	73.1	86.3	109.1	113.5	115.7	117.5	119.8
Paid civilian population	43.6	56.7	64.6	77.8	98.9	102.2	105.5	107.7	110.3
Wage and salary workers	33.2	45.9	55.3	70.9	90.2	93.0	96.4	98.5	101.0
Self-employed	10.4	10.8	9.3	6.9	8.7	9.2	9.1	9.2	9.3
Unpaid family workers	2.1	2.0	1.4	.9	.6	.6	.5	.4	.3
Unemployed	9.5	3.4	4.5	4.7	7.4	9.0	8.0	7.7	7.5
Armed Forces [2]	.4	1.6	2.5	3.0	2.1	1.7	1.7	1.7	1.7
Civilian population covered by public retirement programs	27.2	40.1	60.9	75.2	96.4	99.8	104.7	106.9	109.7
OASDHI [3]	24.0	34.3	55.4	69.1	89.3	92.7	97.5	99.7	102.5
Wage and salary workers	24.0	34.3	48.0	63.3	81.8	84.5	89.0	91.2	93.8
Self-employed	...	...	7.4	5.8	7.5	8.2	8.5	8.5	8.7
Railroad Retirement system	1.2	1.4	.9	.6	.5	.4	.4	.3	.3
Government employees retirement systems [4]	2.0	4.4	4.6	5.5	6.6	6.7	6.8	6.9	6.9
Civilian population covered by other social insurance programs:									
Unemployment insurance [5]	22.6	33.1	43.7	55.8	90.4	91.8	95.8	98.2	(5)
Workers' compensation	22.0	35.3	44.6	59.0	79.1	80.9	84.5	87.0	(5)
Temporary disability insurance	...	5.3	11.3	14.6	18.4	18.7	19.3	19.8	(5)

[1] Monthly average; for all other years, data as of December.

[2] Beginning in 1983, includes armed forces in United States only.

[3] Excludes members of the Armed Forces. Railroad employees are shown separately.

[4] Excludes State and local government employees covered by both OASDHI and their own retirement program. Data represent yearly average.

[5] Data not available.

[6] Includes private and government employers covered by Unemployment Insurance and Unemployment Insurance for Civilian Federal Employees programs.

Source: Labor-force data from the Bureau of the Census, Current Population Survey reported in **Employment and Earnings.** Social insurance coverage estimates prepared by the Social Security Administration.

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Table 2.A3.—Annual maximum taxable earnings and actual contribution rates, 1937–93 and thereafter

Beginning—	Annual maximum taxable earnings		Contribution rate (percent)							
			Employer and employee, each				Self-employed person			
	OASDI	HI	Total	OASI	DI	HI	Total	OASI	DI	HI
1937	$3,000	...	1.0	1.0	...	...	...	...	...	...
1950	3,000	...	1.5	1.5	...	...	...	...	...	...
1951	3,600	...	1.5	1.5	...	...	2.25	2.25	...	...
1954	3,600	...	2.0	2.0	...	...	3.0	3.0	...	...
1955	4,200	...	2.0	2.0	...	...	3.0	3.0	...	...
1957	4,200	...	2.25	2.0	0.25	...	3.375	3.0	0.375	...
1959	4,800	...	2.5	2.25	.25	...	3.75	3.375	.375	...
1960	4,800	...	3.0	2.75	.25	...	4.5	4.125	.375	...
1962	4,800	...	3.125	2.875	.25	...	4.7	4.325	.375	...
1963	4,800	...	3.625	3.375	.25	...	5.4	5.025	.375	...
1966	6,600	$6,600	4.2	3.5	.35	0.35	6.15	5.275	.525	0.35
1967	6,600	6,600	4.4	3.55	.35	.5	6.4	5.375	.525	.5
1968	7,800	7,800	4.4	3.325	.475	.6	6.4	5.0875	.7125	.6
1969	7,800	7,800	4.8	3.725	.475	.6	6.9	5.5875	.7125	.6
1970	7,800	7,800	4.8	3.65	.55	.6	6.9	5.475	.825	.6
1971	7,800	7,800	5.2	4.05	.55	.6	7.5	6.075	.825	.6
1972	9,000	9,000	5.2	4.05	.55	.6	7.5	6.075	.825	.6
1973	10,800	10,800	5.85	4.3	.55	1.0	8.0	6.205	.795	1.0
1974	13,200	13,200	5.85	4.375	.575	.9	7.9	6.185	.815	.9
1975	[1] 14,100	[1] 14,100	5.85	4.375	.575	.9	7.9	6.185	.815	.9
1976	[1] 15,300	[1] 15,300	5.85	4.375	.575	.9	7.9	6.185	.815	.9
1977	[1] 16,500	[1] 16,500	5.85	4.375	.575	.9	7.9	6.185	.815	.9
1978	[1] 17,700	[1] 17,700	6.05	4.275	.775	1.0	8.1	6.01	1.09	1.0
1979	22,900	22,900	6.13	4.33	.75	1.05	8.1	6.01	1.04	1.05
1980	25,900	25,900	6.13	4.52	.56	1.05	8.1	6.2725	.7775	1.05
1981	29,700	29,700	6.65	4.7	.65	1.3	9.3	7.025	.975	1.3
1982	[1] 32,400	[1] 32,400	6.7	4.575	.825	1.3	9.35	6.8125	1.2375	1.3
1983	[1] 35,700	[1] 35,700	6.7	4.775	.625	1.3	9.35	7.1125	.9375	1.3
1984	[1] 37,800	[1] 37,800	[2] 7.0	5.2	.5	1.3	[2] 14.0	10.4	1.0	2.6
1985	[1] 39,600	[1] 39,600	7.05	5.2	.5	1.35	[2] 14.1	10.4	1.0	2.7
1986	[1] 42,000	[1] 42,000	7.15	5.2	.5	1.45	[2] 14.3	10.4	1.0	2.9
1987	[1] 43,800	[1] 43,800	7.15	5.2	.5	1.45	[2] 14.3	10.4	1.0	2.9
1988	[1] 45,000	[1] 45,000	7.51	5.53	.53	1.45	[2] 15.02	11.06	1.06	2.9
1989	[1] 48,000	[1] 48,000	7.51	5.53	.53	1.45	[2] 15.02	11.06	1.06	2.9
1990	[3] 51,300	[3] 51,300	7.65	5.6	.6	1.45	15.3	11.2	1.2	2.9
1991	[3] 53,400	[4] 125,000	7.65	5.6	.6	1.45	15.3	11.2	1.2	2.9
1992	[3] 55,500	[3] 130,200	7.65	5.6	.6	1.45	15.3	11.2	1.2	2.9
1993	[1] 57,600	[1] 135,000	7.65	5.6	.6	1.45	15.3	11.2	1.2	2.9
Future schedule:										
1994-99	(1)	(1)	7.65	5.6	.6	1.45	15.3	11.2	1.2	2.9
2000 and thereafter	(1)	(1)	7.65	5.49	.71	1.45	15.3	10.98	1.42	2.9

[1] Based on automatic adjustment, under 1972a legislation, in proportion to increases in average wage level.

[2] Includes tax credit, see table 2.A5.

[3] Based on automatic adjustment, under 1972a legislation, using a transitional rule, specified by the Omnibus Budget Reconciliation Act of 1989, for computing a "deemed" average annual wage for 1988, 1989, and 1990.

[4] Based on 1990 legislation.

CONTACT: Herman Grundmann/Greg Diez (410) 965-0183/0153 for further information.

Table 2.A4.—Maximum annual amount of contribution, 1937–93

Beginning—	Employee				Self-employed person			
	Total	OASI	DI	HI	Total	OASI	DI	HI
1937	$30.00	$30.00	...	...	...	...	...	...
1950	45.00	45.00	...	...	...	...	...	...
1951	54.00	54.00	...	...	$81.00	$81.00	...	...
1954	72.00	72.00	...	...	108.00	108.00	...	...
1955	84.00	84.00	...	...	126.00	126.00	...	...
1957	94.50	84.00	$10.50	...	141.75	126.00	$15.75	...
1959	120.00	108.00	12.00	...	180.00	162.00	18.00	...
1960	144.00	132.00	12.00	...	216.00	198.00	18.00	...
1962	150.00	138.00	12.00	...	225.60	207.60	18.00	...
1963	174.00	162.00	12.00	...	259.20	241.20	18.00	...
1966	277.20	231.00	23.10	$23.10	405.90	348.15	34.65	$23.10
1967	290.40	234.30	23.10	33.00	422.40	354.75	34.65	33.00
1968	343.20	259.35	37.05	46.80	499.20	396.825	55.575	46.80
1969	374.40	290.55	37.05	46.80	538.20	435.825	55.575	46.80
1970	374.40	284.70	42.90	46.80	538.20	427.05	64.35	46.80
1971	405.60	315.90	42.90	46.80	585.00	473.85	64.35	46.80
1972	468.00	364.50	49.50	54.00	675.00	546.75	74.25	54.00
1973	631.80	464.40	59.40	108.00	864.00	670.14	85.86	108.00
1974	772.20	577.50	75.90	118.80	1,042.80	816.42	107.58	118.80
1975	824.85	616.875	81.075	126.90	1,113.90	872.085	114.915	126.90
1976	895.05	669.375	87.975	137.70	1,208.70	946.305	124.695	137.70
1977	965.25	721.875	94.875	148.50	1,303.50	1,020.525	134.475	148.50
1978	1,070.85	756.675	137.175	177.00	1,433.70	1,063.77	192.93	177.00
1979	1,403.77	991.57	171.75	240.45	1,854.90	1,376.29	238.16	240.45
1980	1,587.67	1,170.68	145.04	271.95	2,097.90	1,624.58	201.37	271.95
1981	1,975.05	1,395.90	193.05	386.10	2,762.10	2,086.43	289.57	386.10
1982	2,170.80	1,482.30	267.30	421.20	3,029.40	2,207.25	400.95	421.20
1983	2,391.90	1,704.675	223.125	464.10	3,337.95	2,539.1625	334.6875	464.10
1984 [1]	2,646.00	1,965.60	189.00	491.40	5,292.00	3,931.20	378.00	982.80
1985 [1]	2,791.80	2,059.20	198.00	534.60	5,583.60	4,118.40	396.00	1,069.20
1986 [1]	3,003.00	2,184.00	210.00	609.00	6,006.00	4,368.00	420.00	1,218.00
1987 [1]	3,131.70	2,277.60	219.00	635.10	6,263.40	4,555.20	438.00	1,270.20
1988 [1]	3,379.50	2,488.50	238.50	652.50	6,759.00	4,977.00	477.00	1,305.00
1989 [1]	3,604.80	2,654.40	254.40	696.00	7,209.60	5,308.80	508.80	1,392.00
1990	3,924.45	2,872.80	307.80	743.85	7,848.90	5,745.60	615.60	1,487.70
1991	5,123.30	2,990.40	320.40	1,812.50	10,246.60	5,980.80	640.80	3,625.00
1992	5,328.90	3,108.00	333.00	1,887.90	10,657.80	6,216.00	666.00	3,775.80
1993	5,528.70	3,225.60	345.60	1,957.50	11,057.40	6,451.20	691.20	3,915.00

[1] Includes tax credit, see table 2.A5.

Table 2.A5.—Tax credits, 1984–89[1]

Act	Group	Tax payable under—	Percent of earnings	Tax credit, effective with respect to—
1983	Employee	Federal Insurance Contributions Act (FICA)	0.3	Remuneration paid in calendar year 1984
	Self-employed	Self-Employment Contributions Act (SECA)	2.7	Self-employment income for taxable years beginning in 1984
			2.3	Self-employment income for taxable years beginning in 1985
			2.0	Self-employment income for taxable years beginning in 1986, 1987, 1988, and 1989

[1] During this period, scheduled taxes were credited to the Social Security trust funds, monies for tax credits were paid from the general fund of the Treasury, and the reduced tax rates were paid by employees and the self-employed.

CONTACT: Herman Grundmann/Greg Diez (410) 965-0183/0153 for further information.

Table 3.B1.—Labor force and estimated workers covered under social insurance programs, 1960-91

(In millions)

Employment and coverage status [1]	1960	1970	1980	1985	1987	1988	1989	1990	1991
Total labor force	73.1	86.3	109.1	117.5	122.0	123.8	125.7	126.2	126.7
Paid civilian population	64.6	77.8	98.9	107.7	113.3	115.6	117.4	117.0	116.2
Unpaid family workers	1.4	.9	.6	.4	.4	.4	.3	.3	.3
Unemployed	4.5	4.7	7.4	7.7	6.5	6.1	6.3	7.3	8.6
Armed Forces [2]	2.5	3.0	2.1	1.7	1.8	1.7	1.7	1.6	1.6
Civilian population covered by public retirement programs	60.9	75.2	96.4	106.6	113.5	116.0	117.9	117.7	117.9
OASDHI [3]	55.4	69.1	89.3	100.3	106.3	108.7	110.5	110.2	[4] 110.5
Railroad Retirement system	.9	.6	.5	.3	.3	.3	.3	.3	.3
Government employees retirement systems [5]	4.6	5.5	6.6	6.0	6.9	7.0	7.1	7.2	7.1
Civilian population covered by other social insurance programs:									
Unemployment insurance [6]	43.7	55.8	90.4	98.2	103.7	106.9	108.8	109.5	106.0
Temporary disability insurance	11.3	14.6	18.4	19.8	21.6	21.8	22.2	22.3	(7)
Workers' compensation	44.6	59.0	79.1	85.1	90.0	92.8	95.3	96.7	95.1

[1] As of December.
[2] Beginning 1983, includes Armed Forces in United States only.
[3] Excludes members of the Armed Forces. Railroad employees are shown separately.
[4] Includes some coverage extensions.
[5] Excludes employees covered by both OASDHI and their own retirement program. Data represent yearly average.
[6] Includes private and government employees covered by Unemployment Insurance and Unemployment Insurance for Civilian Federal Employees programs.
[7] Data not available.

Source: Labor-force data from the Bureau of the Census, Current Population Survey reported in *Employment and Earnings*. Social insurance coverage estimates prepared by the Social Security Administration.

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CONTACT: Ann Bixby (202) 282-7222 for further information.

Federal Civilian Employment After 1983

01901.612 Employees of the Federal Government and Federal Instrumentalities—After 1983

The 1983 Amendments and subsequent legislation provide coverage on or after January 1, 1984, to service of Federal civilian employees (and employees of Federal instrumentalities) who on or after that date:

A. are hired for the first time;

B. return to Federal employment after a separation of more than 365 days, EXCEPT this does not apply to those employees who previously held positions not covered by Social Security *and* who:

   1. return to noncovered Federal service after being detailed or transferred to service with an international organization listed in RS 01901.600; or

   2. return to noncovered Federal service after separation to perform service with the American Institute in Taiwan; or

   3. exercise restoration or reemployment rights after service as a member of a uniformed service (including service in the National Guard and temporary service in the Coast Guard Reserve); or

   4. return to noncovered Federal Service after employment by an Indian tribal government.

C. return to Federal employment after separation of *less* than 365 days AND the prior employment was subject to full Social Security coverage and FICA taxation under the old-law provisions;

D. were in the employ of the Federal Government in a position subject to full Social Security coverage and taxation under the old-law (e.g., in the uniformed services or a temporary employee);

E. elect to be subject to the Federal Employees Retirement System rather than the Civil Service Retirement System.

(See RS 01901.614 for special provisions pertaining to Federal officials. See RS 01901.616 for special provisions pertaining to legislative branch employees.)

In determining whether someone is hired for the first time or had prior employment, the present hiring agency need not be the same as the previous employing agency. Consider all employment for a Federal agency or instrumentality to be employment for the United States.

The following illustrates the above rules:

Example 1:

After graduation from college in July 1984, Pete accepted an appointment with the Department of State. He had no prior Federal civilian service. Pete's services as an employee of the Department of State are covered under Social Security. It is immaterial that he may be covered also under the Foreign Service Retirement System.

Example 2:

Warren was an investigator in a career conditional appointment status for a Federal agency from October 22, 1979, to September 1, 1983, when he resigned to go back to school for a postgraduate degree. After the spring semester, he abandoned his studies and received an appointment with another Federal agency effective August 1, 1984. Warren's services as an employee of the Federal Government are not covered under full Social Security because the break in service was less than 365 days and the prior service was not covered under Social Security. Warren is covered under the Civil Service Retirement System. He is also required to contribute the HI portion of Social Security tax.

Example 3:

Marie, a career Social Security employee, was on maternity leave effective July 15, 1982. After using up her annual and sick leave, she was granted leave without pay (LWOP) from November 27, 1982, through February 15, 1983, when she resigned. On April 12, 1984, she was rehired by SSA. Marie's services are covered under Social Security because she had a break in service in excess of 365 days (February 16, 1983 - April 11, 1984). She is also covered under the Federal Employee's Retirement System.

Example 4:

Allen was hired on November 24, 1983 by the Department of Commerce as a temporary employee. As such, he was not eligible for coverage under the Civil Service Retirement System and was covered by Social Security. On February 4, 1984, he was given a career-conditional appointment. Although November 24, 1983 is the date he was hired, he was not covered by the Civil Service Retirement System on January 1, 1984. Therefore, his services continue to be covered by full Social Security. He will also be covered by the Federal Employees' Retirement System.

Example 5:

James was discharged from the Army with 6 years service on July 7, 1984. Five months later he was hired by SSA. Service in the Armed Forces is considered to be service in the employ of the United States. However, as a servicemember he was covered by Social Security. His hiring by SSA was not the result of an exercise of his reemployment rights. Since his employment for the Federal Government which ended July 7, 1984 was covered by Social Security, the 365-day rule does not apply and his employment by SSA is covered by Social Security.

Example 6:

John was a career employee of HHS. In March 1980, he resigned to serve a 5-year assignment with the World Health Organization. In July 1985 he returned to his former employment with HHS. His services are excluded from Social Security because he meets an exception to the 365-day separation rule.

01901.614 Federal Officials

Service of the following Federal employees and officials is covered effective with respect to service performed after December 31, 1983.

A. The President and the Vice-President.

B. Individuals placed in the Executive Schedule under section 5312 through 5317 of the title 5, U.S. Code. Generally, this includes level I-V positions as cabinet heads, subcabinet members, independent agency top staff, and commission members. These are political appointees, appointed by the President with the advice and consent of the Senate. On occasion, when creating new positions, Congress will not amend the Executive Schedule, but will state that the position will be paid at a rate equivalent to a rate listed in the Executive Schedule. Service of individuals holding such positions is not automatically covered as of January 1, 1984. Coverage of service of such individuals hired on or after that date will depend upon whether the individuals are newly hired Federal employees.

C. Noncareer appointees in the Senior Executive Service and noncareer members of the Senior Foreign Service.

D. Individuals appointed by the President (or his designee) or the Vice President under sections 105(a)(1), 106(a)(1) or 107(a)(1) or (b)(1) of title 3, U.S. Code, if the maximum level of basic pay for such

position is at or above the rate for level V of the Executive Schedule. Generally, they serve in the White House Office, on the staff of the Vice President, or on the Domestic Policy Staff and the Office of Administration. Some of these individuals are career civil servants whose employment would not ordinarily be covered. There may also be appointments not made under any of these authorities. If so, service in such positions is not automatically covered.

E. The Chief Justice of the United States, an Associate Judge [sic] of the Supreme Court, a judge of the United State [sic] court of appeals, a judge of a United States district court (including the district court of a territory), a judge of the United States Claims Court, a judge of the United States Court of International Trade, a judge of the United States Tax Court, a United States Magistrate, or a referee in bankruptcy or United States bankruptcy judge.

F. All Members, Delegates, or Resident Commis-sioners of or to the Congress.

01901.616 Legislative Branch Employees

Special rules exist for employees of the legislative branch. That branch consists of the Senate, the House of Representatives, the Office of the Architect of the Capitol, the United States Botanical Garden, the General Accounting Office, the Government Printing Office, the Library of Congress, the Office of Technology Assessment, the Congressional Budget Office, and the Copyright Royalty Tribunal.

Under old-law provisions, service in the employ of the legislative branch was totally excluded from Social Security coverage. At the same time participation in the Civil Service Retirement System (CSRS) was not mandatory for legislative branch employees, although they could elect to participate.

Under current law, service performed by a legislative branch employee, hired for the first time by the Federal Government after December 31, 1983, is subject to Social Security coverage and taxation. In general, legislative branch employees who were participating in CSRS or another Federal retirement system (other than one for members of the uniformed services) on December 31, 1983 are excluded from Social Security. However, if they receive lump-sum payments from the Federal retirement system after December 31, 1983 or otherwise cease to be subject to CSRS after that date while performing service in the legislative branch, they will be covered under Social Security. However, a legislative branch employee who would be covered under Social Security as a result of this provision and who received or filed an application for a lump-sum payment before June 15, 1984 from a Federal retirement system or who otherwise ceased to be subject to the CSRS after December 31, 1983 could be excluded from Social Security if he joined the CSRS before August 19, 1984. A legislative branch employee who is hired July 19, 1984, after a break in Federal service of more than 365 days and who otherwise meets these requirements could be excluded from Social Security if he joined CSRS within 30 days after he is hired.

The above is intended only as a general statement of complex rules. It should not be relied upon in advising legislative branch employees of their status.

UNITED STATES COURT OF FEDERAL CLAIMS

Civil Docket No. 705-89 C

JUDGE TERRY J. HATTER, et al., Plaintiffs,

v.

THE UNITED STATES, Defendant.

DECLARATION OF PETER R. LYNN

PETER R. LYNN deposes and says:

A. QUALIFICATIONS

1. I am the Founder and Chief Executive Officer of Government Retirement and Benefits, Inc. ("GRB") of 5999 Stevenson Avenue, #403, Alexandria, Virginia 22304. I am also Secretary and Treasurer of GRB. I have served in these capacities since March 1986.

2. I graduated cum laude from Lycoming College in Pennsylvania with a B.A. degree in economics and have completed graduate work in both accounting and economics.

3. I received my certification as a Certified Employee Benefits Specialists ("CEBS") in 1980 from the University of Pennsylvania Wharton School and the International Foundation of Employee Benefit Plans.

4. I am coeditor of GRB's books "YOUR CIVIL SERVICE RETIREMENT SYSTEM" and "YOUR FEDERAL EMPLOYEES RETIREMENT SYSTEM."

5. I served for 17 years with the United States General Accounting Office ("GAO") as an expert on federal employee retirement programs. While serving with GAO, I prepared reports for the Congress on the benefit provisions of over 100 different federal employee retirement plans and the relationships of these plans with the Social Security program.

During my last 18 months with GAO (January 1985 to June 1986), I was assigned to the United States Senate Governmental Affairs Committee to assist in designing the new Federal Employees Retirement System ("FERS").

6. I have personal knowledge of the facts set forth in this Declaration.

B. THE SOCIAL SECURITY SYSTEM IN GENERAL

7. Employees whose employment is covered by Social Security are subject to a Social Security tax, comprised of two portions. One portion of the tax is used to fund old age, survivor, and disability insurance benefits and is referred to as the OASDI portion. The second portion is used to fund hospital insurance benefits and is referred to as the HI or Medicare portion.

8. Unlike income tax, the Social Security program is not a general obligation of all citizens. Rather, Social Security withholdings constitute a "premium tax" used to fund a social insurance program. Unlike income tax, Social Security payments are contributed with a specific focus on the retirement, survivors' and disability benefits available under this social insurance program.

9. In the early 1980s, the federal government became concerned about the financial condition and integrity of the Social Security program and Congress began to look for ways to increase the funds contributed to the program.

10. Prior to 1983, federal civilian employees covered by a federal retirement plan (e.g., Civil Service Retirement System, Foreign Service Retirement System, Federal Judiciary Retirement System) were excluded from coverage under the Social Security program. This included the vast majority of federal employees, including federal judges, members of Congress and their staff, Executive branch political officials, appointees and their staff.

11. Effective January 1983, the Tax Equity and Fiscal Responsibility Act of 1982 (P.L. 97-248, § 278, approved September 3, 1982) required all federal civilian employees to pay the HI (Medicare) portion of Social Security.

C. SOCIAL SECURITY ACT AMENDMENTS OF 1983

12. The Social Security Act Amendments of 1983 (P.L. 98-21, approved April 20, 1983) ("the 1983 Amendments"), made all federal employees who were first hired after December 31, 1983, subject to full Social Security coverage. The Act required such employees to pay both the OASDI and HI portions of the Social Security tax.

13. The 1983 Amendments also provided that the following groups of employees were to be subject to full Social Security coverage even though their first date of federal employment was prior to January 1, 1984.

- Employees who returned to federal service after a separation of more than 365 days.
- Employees who returned to federal service after a separation of less than 366 days and their prior federal civilian service was subject to full Social security coverage under the Social Security laws in effect prior to 1983. This situation would apply primarily to employees hired for temporary or intermittent federal service prior to January 1, 1984, and who were first converted to a permanent appointment after December 31, 1983.

Coverage of Senior Officials

14. Before 1984, most federal "senior officials" were covered by the Civil Service Retirement System (CSRS) and therefore were excluded from Social Security (OASDI)

coverage. Members of Congress were excluded from Social Security coverage before 1984 regardless of whether or not they elected CSRS coverage.

15. The 1983 Social Security Amendments extended mandatory OASDI coverage to certain senior officials, effective January 1, 1984, even though most of these senior officials also had other retirement coverage as federal employees.

16. Senior officials affected by the 1983 amendments include:

(a) The President and Vice President of the United States.

(b) Certain individuals in Executive Schedule positions listed under sections 5312 through 5317 of title 5, United States Code. Examples of these individuals include Cabinet level officials; Deputy, Under, and Assistant Secretaries; Agency Directors and Assistant Directors; and Executive Branch Department level General Counsels.

(c) Noncareer appointees in the Senior Executive Service or a noncareer member of the Senior Foreign Service.

(d) Individuals on the personal staff of the President and Vice President appointed under sections 105(a)(1), 106(a)(1), or 107(a)(1) or (b)(1) of title 3 of the U.S. Code, including the Domestic Policy Staff and the Office of Administration, if the maximum rate of pay for their positions is at or above the pay rate for level V of the Executive Schedule.

(e) Service performed as a Chief Justice of the United States, an Associate Justice of the Supreme Court, a judge of a United States court of appeals, a judge of a United States district court (including the

district court of a territory), a judge of the United States Claims Court, a judge of the United States Court of International Trade, a judge of the United States Tax Court, a United States magistrate, or a referee in bankruptcy or United States bankruptcy judge.

(f) Service performed as a Member, Delegate, or Resident Commissioner of or to the Congress.

(g) Any other service in the legislative branch of the Federal Government if such service was being performed by an individual who, on December 31, 1983, was not covered by the Civil Service Retirement System (CSRS). Such service refers primarily to congressional employees. Like Members of Congress, congressional employees did not have to participate in the CSRS. However, after P.L. 98-21 was enacted, they had to decide before December 31, 1983, whether they wanted to be covered by CSRS or be covered by full Social Security beginning January 1, 1984.

17. Except as outlined in paragraphs 16(a) through 16(g) above, the 1983 Amendments did not extend mandatory Social Security coverage to:

- Employees who were covered by CSRS on December 31, 1983.
- Employees who have been continuously covered under CSRS since December 31, 1983, and who separate from federal service, and return to Government service *within* 365 days.

18. With the exception of federal judges, most of the employees to whom Social Security was mandatorily extended in the 1983 Amendments were elected officials, political officials of the Executive branch, or staff for these officials.

D. FEDERAL EMPLOYEES' TEMPORARY ADJUSTMENT ACT OF 1983

Interim plan offsets Social Security withholding

19. To coordinate other federal retirement coverage with Social Security and offset the burden of Social Security deductions for those mandatorily added by the 1983 Social Security Amendments, Title II of P.L. 98-168, the Federal Employees' Retirement Contribution Temporary Adjustment Act of 1983 (approved November 29, 1983) (the "Adjustment Act"), provided an "interim plan" for employees first hired after December 31, 1983, and for senior officials who would be covered under both the CSRS and full Social Security as a result of the Social Security Amendments of 1983.

20. Under the interim plan (which was intended to be temporary until a new retirement system could be designed and implemented for employees first hired after December 31, 1983) the CSRS employee contribution rate for individuals covered by both CSRS and full Social Security was reduced from 7.0 percent to 1.3 percent of pay. The difference of 5.7 percentage points was equivalent to the OASDI portion of the Social Security tax at that time.

Special elections for senior officials

21. Under the Adjustment Act, senior officials who (1) were to be mandatorily covered by full Social Security under the provisions of the 1983 Amendments and (2) who were participating in a federal retirement plan which required employee contributions were given the opportunity to make elections regarding their retirement coverage by December 31, 1983. Instead of the interim plan, these officials could elect:

- Full CSRS coverage and full Social Security taxes; or
- No CSRS coverage (with no CSRS with-holdings) and full Social Security taxes.

A true and correct copy of the form these officials were provided for making these elections is attached as Exhibit D-1.

22. Senior officials' elections took effect January 1, 1984. Senior officials who made no election were automatically covered under the interim plan on January 1, 1984, and paid the full Social Security tax and 1.3 percent of pay for CSRS.

23. Under the Adjustment Act, (1) the President and Vice President, (2) individuals in positions placed in the Executive Schedule sections 5312 through 5317, (3) noncareer SES appointees, (4) Presidential staff and (5) Members of Congress had the option to make special elections.

24. Under the Adjustment Act, Members of Congress who were not participating in CSRS before December 31, 1983, could elect, by December 31, 1983, either the interim plan or full CSRS coverage. If they made no election, they continued to have no CSRS coverage.

25. Members of Congress who were participating in CSRS on December 31, 1983, could elect, by December 31, 1983, either no CSRS coverage or full CSRS coverage. If they made no election, they were covered under the interim plan on January 1, 1984.

26. Members of Congress who were not participating in CSRS on December 31, 1983, (including newly elected Members) could later elect the interim plan, but not full CSRS coverage. *See* P.L. 98-168, § 208.

27. Under the Adjustment Act, neither the provisions for the interim plan or for the special elections (for those mandatorily covered under the 1983 Social Security Amendments) were applicable to federal judges. Consequently, unlike Members of Congress and Executive branch senior officials, federal judges were given no choices which would have afforded them financial relief from the

impact from the reduction in their salaries due to the newly imposed Social Security tax. Therefore, federal judges remained subject to full Social Security in addition to their statutory judicial retirement plan.

E. DEFICIT REDUCTION ACT OF 1984

Second opportunity for special elections

28. To coordinate other federal retirement coverage with Social Security and offset the burden of Social Security deductions for those mandatorily added by the 1983 Social Security Amendments, the Deficit Reduction Act of 1984 (P.L. 98-369, approved July 18, 1984) gave senior officials who had been eligible to make special elections under the Adjustment Act a second opportunity to make elections regarding their retirement coverage. During this second opportunity, senior officials had the same election options they had under the Adjustment Act:

(a) Full coverage under both Social Security and CSRS; or

(b) Coverage under Social Security only; or

(c) Coverage under Social Security and CSRS with reduced CSRS deductions.

29. An election under the Deficit Reduction Act of 1984 was valid only if it was made before September 16, 1984. If senior officials failed to make an election before the deadline, they continued to have the retirement coverage in effect on January 1, 1984.

30. Individuals who became senior officials after December 31, 1983 were not eligible to make any special elections concerning their retirement coverage, but if they became senior officials during 1984, 1985, or 1986, they were covered under the Adjustment Act's interim plan provisions, regardless of their previous coverage under CSRS.

31. Again, in contrast to Members of Congress and Executive branch senior officials, the Deficit Reduction Act of 1984 did not provide federal judges any special elections concerning their retirement coverage.

F. FEDERAL EMPLOYEES' RETIREMENT SYSTEM ACT OF 1986

32. In 1986, Congress completed its work in designing a new federal employee retirement plan to replace the "interim plan" established by the 1983 Adjustment Act. In designing the plan, known as FERS, the overall objectives were to establish retirement benefits for new employees that, when combined with Social Security benefits, would (1) provide an adequate retirement income and (2) would not cost new employees any more than what federal employees not covered by Social Security are required to pay.

33. The Federal Employees' Retirement System Act of 1986 (P.L. 99-335, approved June 6, 1986) (the "FERS Act") established a new federal retirement system for individuals first employed by the government after December 31, 1983. Coverage under the new system took effect January 1, 1987.

34. Individuals covered by FERS are required to pay the full Social Security tax and a small contribution for their FERS coverage. (An employee's FERS contribution is a percentage of pay and equals the difference between 7.0 percent and the current OASDI portion of the Social Security tax.) For employees covered by FERS, the government also automatically contributes 1 percent of their pay to the Federal Thrift Savings Plan (TSP). At their discretion, FERS employees may contribute up to 10 percent of their basic pay to their TSP account, and can receive up to a 4 percent Government match on their TSP contributions. Federal judges are not covered by FERS, but they may contribute to the TSP. *See* 5 U.S.C. §8440a.

Federal judges are not eligible for a Government match on their TSP contributions.

35. The FERS Act also established a CSRS Offset plan to replace the CSRS interim plan. Rather than placing all persons covered by the CSRS interim plan under FERS, the FERS Act excluded from FERS coverage employees who, as of December 31, 1986, had at least 5 years of creditable civilian service under CSRS. Under the CSRS Offset plan, an employee's CSRS retirement deductions are reduced (offset) by the OASDI portion of the Social Security tax.

36. The FERS Act also excluded from FERS coverage all senior officials who had special election opportunities in December 1983 and September 1984 and who had continued to serve as senior officials continuously from December 31, 1983, without a break in service exceeding 365 days. The elections these senior officials made in December 1983 and September 1984 remained in effect after FERS began, regardless of the amount of civilian service they had at the time of the election.

Open season for elections

37. The FERS Act provided an opportunity for employees covered by the CSRS and CSRS Offset plans to transfer to FERS retirement coverage. This opportunity or "open season" began July 1, 1987, and ended December 31, 1987. Employees who did not elect to transfer to FERS during the open season, retained their prior coverage.

38. Senior officials who were given special election opportunities under the Adjustment Act also were given special election opportunities under the FERS Act if they had served continuously in such a position without a break exceeding 365 days.

39. Under FERS, senior officials and Members of Congress were given the following options during the open season:

(a) Retain previous retirement coverage:

- Full Social Security and full CSRS
- Social Security only
- CSRS Offset coverage (which was previously CSRS interim coverage)

(b) Elect coverage under CSRS with reduced retirement deductions (CSRS Offset); or

(c) Elect coverage under FERS.

A true and correct copy of the forms officials were provided for making these elections is attached as Exhibit D-2.

40. Again, unlike senior executive officials, Members of Congress, and others covered by CSRS or CSRS Offset plans, federal judges did not have the opportunity to make any of these elections.

G. CONCLUSIONS

41. The overall objectives of the 1983 Social Security Amendments were to improve the financial condition and integrity of the Social Security program. Two primary provisions of the 1983 Amendments pertaining to federal employment were that (1) all federal employees first hired after December 31, 1983, would be covered by full Social Security and (2) certain federal employees hired before January 1, 1984, would also be covered by Social Security.

42. Based on my work at GAO and consequential interactions with Members of Congress and congressional staff, the following is my professional opinion as to the reasons for these two provisions:

(a) The requirement that all federal employees hired after December 31, 1983 be covered by full Social Security was intended to provide an immediate infusion of funds for the Social Security program with relatively little or no immediate increase in Social Security benefit payments.

(b) The requirement that certain federal employees first hired before January 1, 1984, would also be covered by Social Security on that date was intended to improve the integrity of the Social Security program itself. In comparison to the total 1983 federal civilian workforce (approximately 2.5 million), the employees affected by this provision probably represented less than one-half of one percent of that workforce. It was not envisioned that their mandatory inclusion in the Social Security program would have any real impact on improving the financial condition of the program. Rather, their inclusion in the program was symbolic—it provided a signal that Members of Congress and high level Executive branch political officials (*i.e.*, collectively, that body of individuals responsible for establishing and administering federal rules, regulations, and policies) would now also have a vested interest in the future of the Social Security program.

43. The Adjustment Act, the Deficit Reduction Act, and the FERS Act, each gave employees who were mandatorily covered by full Social Security (even though they were first hired before January 1, 1984) opportunities to choose among different options and consequential costs. The choices allowed employees mandatorily covered by the 1983 Social Security Amendments an opportunity (1) to coordinate their retirement coverage between a Federal employee retirement plan and Social Security benefits and (2) to offset the reduction in salary resulting from the newly imposed Social Security tax.

44. Federal judges were the only group of employees mandatorily added to Social Security by the 1983 Amendments who were not provided with any choices allowing them to offset the economic effect of Social Security withholding.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: 8/27/1993 PETER R. LYNN

EXHIBIT D-1

ELECTION OF CIVIL SERVICE RETIREMENT COVERAGE

Part A. Instructions to Employing Agency

Give each official who is entitled to elect whether to continue retirement coverage under Public Law 98-168 a copy of this form. (These are officials whose positions are covered by civil service retirement and are listed in the Executive Schedule in sections 5312-5317 of title 5, U.S. Code, or who are covered by civil service retirement and are non-career members of the Senior Executive Service.) When the official returns the completed form, the agency must: complete the certification in part D. Provide a copy of the certified form to the employee for his or her personal records. A second copy must be filed on the right side of the individual's official personnel folder. The original must be sent to the payroll office, where it will be attached to his or her Standard Form 2806, Individual Retirement Record, which is to be closed out and sent to the Office of Personnel Management according to separate instructions to payroll offices.

If an affected official does not return a signed election before January 1, 1984, complete the identifying information in part B and the certification in part D. Send a copy to the official and file two copies as instructed above.

Enter address to which election form is to be returned.

Part B. Official's Election

Name of Official (Type or Print)	Position Title	Social Security Number

Beginning January 1, 1984, your position is covered by social security and transitional civil service retirement provisions. However, as a one-time election, you are being permitted to choose whether you want to terminate all civil service retirement or you want to continue under your present civil service retirement coverage.

IMPORTANT: BEFORE MAKING AN ELECTION, BE SURE TO READ THE INFORMATION ON THE REVERSE SIDE OF THIS FORM. RETURN THE COMPLETED FORM TO THE ADDRESS SHOWN ABOVE BEFORE JANUARY 1, 1984.

Consider your election carefully. YOU MAY NOT SUBMIT AN ELECTION OR CHANGE YOUR ELECTION AFTER JANUARY 1, 1984. If you do not return a signed form to the address given above before January 1, your agency will certify that you have not responded and you will automatically be covered under the transitional civil service retirement provisions.

See your personnel office if you have questions.

TERMINATE CIVIL SERVICE RETIREMENT COVERAGE

I elect not to participate in any civil service retirement plan. I UNDERSTAND THAT I MUST CONTRIBUTE TO SOCIAL SECURITY.

Signature	Date

CONTINUED CIVIL SERVICE RETIREMENT COVERAGE

I elect to remain under the Civil Service Retirement System on and after January 1, 1984, and to pay the contribution (7 or 7½% of pay, as applicable) for civil service retirement benefits. I UNDERSTAND THAT I MUST CONTRIBUTE TO SOCIAL SECURITY ALSO.

Signature	Date

Part C. Official's Declination

COVERAGE UNDER THE TRANSITIONAL CIVIL SERVICE RETIREMENT PROVISIONS

I understand that I have a one-time opportunity to elect to have no civil service retirement coverage at all, or to remain under the Civil Service Retirement System. I prefer to be covered under the transitional civil service retirement provisions. I UNDERSTAND THAT I MUST CONTRIBUTE TO SOCIAL SECURITY ALSO.

Signature	Date

Part D. Agency Certification

I certify that the above named official is entitled to elect retirement coverage effective January 1, 1984, under Public Law 98-168, and *(check one)*

☐ the official completed and returned this election before January 1, 1984.

☐ the official was contacted on _____ (Date form delivered) and did not complete the election before January 1, 1984.

Signature of Director of Personnel	Agency	Date

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CIVIL SERVICE RETIREMENT ELECTION INFORMATION FOR COVERED OFFICIALS

On January 1, 1984, your position will be placed under Social Security coverage and a transitional Civil Service Retirement plan. However, Public Law 98-168 allows you to modify your Civil Service Retirement coverage. Your options and important information about them are described below. NO MATTER WHAT SELECTION YOU MAKE YOU WILL REMAIN COVERED BY SOCIAL SECURITY.

COVERAGE UNDER THE TRANSITIONAL CIVIL SERVICE PROVISIONS

Under this provision you will contribute 1.3 percent of your basic pay for civil service retirement coverage beginning on January 1, 1984.

If you retire during this transitional period for any reason other than disability, you will have to deposit the difference between the 1.3 percent you actually paid and the total amount you would have contributed under the rules for the regular Civil Service Retirement System to receive credit for service during the transitional period. If you are a disability retiree, or die in service and your survivor(s) is entitled to a survivor annuity, no deposit is necessary to receive credit for service during the transitional period. Civil service disability and survivor benefits which begin during the transitional period will, however, be offset by the amount of any Social Security benefit that is attributable to service performed after January 1, 1984. In the case of survivor benefits, the offset can be eliminated if you make a deposit before your death.

TERMINATE CIVIL SERVICE RETIREMENT COVERAGE

You may choose to end your civil service retirement coverage on December 31, 1983. Beginning January 1, 1984, you will be covered only by Social Security.

If you choose this option, you may apply to receive a refund of your civil service retirement deductions if you are not eligible for immediate annuity. Alternatively, you may choose this option, leave your civil service retirement deductions intact, and obtain a deferred annuity at age 62 if you have at least 5 years of Federal civilian service.

CONTINUED CIVIL SERVICE RETIREMENT SYSTEM COVERAGE

Under this option your coverage under the Civil Service Retirement System continues with no change, and you will continue to pay the 7% retirement deduction (7.5% if you are in a position covered by law enforcement/firefighter provisions in U.S.C. 8336(c)). You will be entitled to credit under both Social Security and the Civil Service Retirement System for your service beginning January 1, 1984.

PRIVACY ACT STATEMENT

Solicitation of this information is authorized by Public Law 98-168. The information you furnish will be used to determine your civil service retirement coverage on and after January 1, 1984. Furnishing your Social Security number, as well as other data, is voluntary, but failure to do so may result in the loss of your opportunity to make this election or the agency's inability to effect your election.

Retirement Election for Certain Senior Officials
Federal Employees Retirement System

Section 1. Instructions for Officials

- See Privacy Act Information on page 2 of this form.
- Read information on pages 3 and 4 of this form.
- Make your election in Section 3.
- Sign in Section 5.

- Be sure to read your ***FERS Transfer Handbook.***
- If you elect FERS, any CSRS designation of beneficiary (SF 2808) is cancelled. If you want to make a new designation of beneficiary, use SF 3102.

Section 2. Identifying Information *(type or print)*

Name *(Last, first, middle)*	Date of birth *(mo, dy, yr)*	Social Security Number

Section 3. Election of Retirement Coverage

Place your initials in one of the boxes below to indicate your choice of retirement coverage. (Initial only one box.)

A. Election of FERS --
This election is available to all eligible officials.

☐ I elect FERS coverage. I understand that I will continue to be covered under Social Security. I authorize that withholdings be made from my pay for both FERS and Social Security purposes. I understand that this decision is irrevocable. (If you initial this box, you must also complete Section 4.)

B. Election of CSRS Offset --
This election is available to all eligible officials.

☐ I elect CSRS Offset coverage. I understand that I will continue to be covered under Social Security. I authorize that withholdings be made from my pay for both CSRS Offset and Social Security coverage.

C. Election of Full CSRS --
This election is available only to those officials who now have full CSRS.

☐ I previously elected full CSRS coverage and I want that election to stand. I understand that I will continue to be covered by Social Security. I authorize that withholdings be made from my pay for full CSRS coverage (7, 7 1/2, or 8% of pay, as applicable) and Social Security coverage (in 1987, 5.7% of pay up to $43,800).

D. Election of No Retirement Coverage --
This election is available only to those officials who have no CSRS coverage because of their previous election.

☐ I previously elected to have no retirement coverage in addition to my Social Security coverage, and I now want that election to stand. I understand that I cannot participate in the Thrift Savings Plan.

Section 4. Former Spouse Information

If you initialed box A above, you must complete this Section.
If you initialed box B, C, or D above, skip to Section 5.

Do you have a living former spouse who has not remarried before reaching age 55 to whom a court order, on file at OPM, awards a portion of your annuity or survivor benefits based on your Federal service?

☐ Yes → Attach OPM Form 1556, Former Spouse's Consent to FERS Election, your request for waiver of consent requirement, or your request for extension of election deadline in order to modify court order.

☐ No

☐ I don't know if a court order is on file at OPM. I have attached OPM Form 1560 requesting OPM to determine whether a qualified court order is on file.

Section 5. Employee's Certification

I hereby certify that all statements made on this election are true to the best of my knowledge.

Signature	Date

Warning: Any intentional false statement in this election or willful misrepresentation relative thereto is a violation of the law punishable by a fine of not more than $10,000 or imprisonment of not more than 5 years or both. (18 USC 1001)

For Agency Use Only	Date of receipt by agency

Office of Personnel Management
5 CFR 846

OPM Form 1561
June 1987

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Privacy Act Statement

Solicitation of this information is authorized by the Federal Employees' Retirement System Act (Public Law 99-335). The information you furnish will be used to identify records properly associated with your election, to obtain additional information if necessary, to determine and allow present or future benefits, and to maintain a unique identifiable claim file. The information may be shared with national, state, local, or other charitable or social security administrative agencies in order to determine benefits under their programs, to obtain information necessary under this program, or to report income for tax purposes. It may also be shared with law enforcement agencies when they are investigating a violation or potential violation of the civil or criminal law. Executive Order 9397 (November 22, 1943) authorizes use of the social security number. Furnishing the social security number, as well as other data, is voluntary but failure to do so may delay or make it impossible for us to determine your eligibility to receive benefits.

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FERS

Retirement Election for Certain Members of Congress

Federal Employees Retirement System

Section 1. Instructions for Members

- See Privacy Act Information on page 2 of this form.
- Read information on pages 3 and 4 of this form.
- Make your election in Section 3.
- Sign in Section 5.

- If you elect FERS, any CSRS designation of beneficiary (SF 2808) is cancelled. If you want to make a new designation of beneficiary, use SF 3102.

Section 2. Identifying Information *(type or print)*

Name *(Last, first, middle)*	Date of birth *(mo, dy, yr)*	Social Security Number

Section 3. Election of Retirement Coverage

Place your initials in one of the boxes below to indicate your choice of retirement coverage. (Initial only one box.)

A. Election of FERS –
This election is available to all eligible Members.

☐ I elect FERS coverage. I understand that I will continue to be covered under Social Security. I authorize that withholdings be made from my pay for both FERS and Social Security purposes. I understand that this decision is irrevocable. (If you initial this box, you must also complete Section 4.)

B. Election of CSRS Offset –
This election is available to all eligible Members.

☐ I elect CSRS Offset coverage. I understand that I will continue to be covered under Social Security. I authorize that withholdings be made from my pay for both CSRS Offset and Social Security coverage (8% of pay).

C. Election of Full CSRS –
This election is available only to those Members who now have full CSRS.

☐ I previously elected full CSRS coverage and I want that election to stand. I understand that I will continue to be covered by Social Security. I authorize that withholdings be made from my pay for full CSRS coverage (8% of pay) and Social Security coverage (in 1987, 5.7% of pay up to $43,800).

D. Election of No Retirement Coverage –
This election is available only to those Members who have no CSRS coverage because of their previous election.

☐ I previously elected to have no retirement coverage in addition to my Social Security coverage, and I now want that election to stand. I understand that I cannot participate in the Thrift Savings Plan.

Section 4. Former Spouse Information

If you initialed box A above, you must complete this Section.
If you initialed box B, C, or D above, skip to Section 5.

Do you have a living former spouse who has not remarried before reaching age 55 to whom a court order, on file at OPM, awards a portion of your annuity or survivor benefits based on your Federal service?

☐ Yes ——→ Attach OPM Form 1556, Former Spouse's Consent to FERS Election, your request for waiver of consent requirement, or your request for extension of election deadline in order to modify court order.

☐ No

☐ I don't know if a court order is on file at OPM. I have attached OPM Form 1560 requesting OPM to determine whether a qualified court order is on file.

Section 5. Employee's Certification

I hereby certify that all statements made on this election are true to the best of my knowledge.

Signature	Date

Warning: Any intentional false statement in this election or willful misrepresentation relative thereto is a violation of the law punishable by a fine of not more than $10,000 or imprisonment of not more than 5 years or both. (18 USC 1001)

For Servicing Office Use Only	Date of receipt by agency

Privacy Act Statement

olicitation of this information is authorized by the Federal Employees' Retirement System Act (Public Law 99-335). The information you furnish will be used to identify records properly ssociated with your election, to obtain additional information if ..ecessary, to determine and allow present or future benefits, and to maintain a unique identifiable claim file. The information ay be shared with national, state, local, or other charitable or ocial security administrative agencies in order to determine enefits under their programs, to obtain information necessary under this program, or to report income for tax purposes. It may also be shared with law enforcement agencies when they are investigating a violation or potential violation of the civil or criminal law. Executive Order 9397 (November 22, 1943) authorizes use of the social security number. Furnishing the social security number, as well as other data, is voluntary but failure to do so may delay or make it impossible for us to determine your eligibility to receive benefits.

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Information for Members of Congress

Who is eligible to make the election described on this form?

You are eligible to make the election described on this form if you are a Member of Congress (including Vice President, Delegate, and Resident Commissioner) and if:

- Beginning January 1, 1984, you were mandatorily* covered by Social Security, AND
- You had an opportunity to make retirement elections in December 1983 and September 1984, AND
- You have continued as a Member of Congress since December 31, 1983, without more than a one-year break in service, AND
- You continue to be a Member on the effective date of your election.

* In making your decision about retirement coverage, you should note that the "Windfall Elimination Provision" described on page 45 of the *FERS Transfer Handbook* does not apply to the Social Security benefits of individuals who were mandatorily covered by Social Security.

What choices are available?

The coverage you now have will continue unless you elect to transfer (1) to the Federal Employees Retirement System (FERS), or (2) to the CSRS Offset provisions, if you are not already under them. Only those Members who are already covered under the full civil service retirement provisions may elect to continue full CSRS coverage. Only those Members who previously elected to have no retirement coverage other than Social Security may continue to have no additional retirement coverage.

You may make your election of retirement coverage during the period from July 1, 1987, through December 31, 1987. If you do not make an election by December 31, 1987, you will keep your current coverage just as if you had affirmatively elected it during this period. If you currently have no retirement coverage other than social security, you may elect coverage under CSRS Offset in the future, so long as you have not previously elected FERS coverage.

Effect of later events on your retirement coverage

The retirement coverage you elect at this time will continue throughout your Federal career unless some very specific events occur. If you elect FERS coverage, that coverage will continue during all future service as a Member or Federal employee unless the service is excluded from FERS coverage (such as a temporary appointment of less than a year).

If you do not elect FERS coverage now, you may have the opportunity to do so in the future if you have a break in service of at least 4 days.

If you elect CSRS Offset coverage, that coverage will continue during all future service as a Member or Federal employee that is not excluded from CSRS coverage (such as an indefinite appointment) or Social Security coverage. If you were to become employed in a career position less than one year after leaving Congress, your Social Security would stop and you would have full CSRS coverage. If you are again employed in a position subject to Social Security coverage, your CSRS Offset coverage would resume.

If you elect full CSRS coverage, that coverage continues during any future service that is not excluded from CSRS. However, if you move to a career appointment without a one year break in service, your Social Security coverage will stop.

If you elect to have no retirement coverage other than Social Security, you may elect CSRS Offset later. You may not obtain FERS coverage so long as you are continuously a Member of Congress.

What is FERS?

- FERS is the new retirement system for Federal employees established by the Federal Employees' Retirement System (FERS) Act of 1986. FERS has three parts: the basic benefit, social security, and the savings plan.
- The Congressional Research Service has prepared information tailored for Members of Congress. It is available through your servicing office.
- The *FERS Transfer Handbook* (available through your servicing office) is also a source of information about FERS.
- Consider your decision carefully - an election of FERS coverage is irrevocable.

What is "full" CSRS coverage?

"Full" CSRS is the old Civil Service Retirement System. If you previously elected to retain full CSRS coverage (at 8% of pay) you may choose to continue to retain it. You would continue to pay the full CSRS withholding rate (in addition to Social Security), and when you retire, you would receive full CSRS benefits without the "offset" described below. The *FERS Transfer Handbook* also provides information about CSRS coverage.

What is CSRS "Offset" coverage?

Under the offset provisions, a Member is covered under CSRS and Social Security. The CSRS withholdings are offset by the amount of the Social Security Old Age, Survivors, and Disability withholdings. At retirement, the civil service retirement benefit is reduced by the amount of the Social Security benefit the person is entitled to that is attributable to the post-1983 service. The offset is made when the basic requirements for Social Security are met (usually at age 62). See "CSRS Offset Employees" on page 57 of the *FERS Transfer Handbook* for more information about this type of coverage.

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Condition for making a FERS election

Your spouse's consent is not needed to elect FERS coverage. However, if a qualifying court order is on file at the Office of Personnel Management and it grants either a portion of your future CSRS annuity or a CSRS survivor benefit to a former spouse, you cannot elect FERS unless that former spouse consents to the election. OPM can grant you an extension of time to make your election if you need extra time to obtain a modification of the court order so that your former spouse will consent to your election or so that consent is not required (that is, by eliminating any right of your former spouse to your future retirement benefit and/or a survivor benefit). You may also request a waiver of the consent requirement if you can't locate your former spouse. If you need to request an extension of time or a waiver of the consent requirement, ask your servicing office how your request should be submitted.

Although few individuals have their retirement benefits affected by court orders, it is important that you answer Section 4 accurately. If you are unsure, mark the "I don't know..." box. If you answer "No" and OPM later finds that a court order was on file with OPM on the date of your election and your former spouse does not consent to your election, your election of FERS coverage will be void.

When coverage begins

Generally, your election is effective on the first day of the month after it is received by your servicing office. However, special rules apply if you elect FERS coverage and there is a court order on file at OPM as described earlier and your former spouse does not consent to your election or you ask OPM to determine whether or not it has such a court order on file.

If you ask for a waiver of the consent requirement and OPM grants it, your election will be effective the first day of the month after OPM notifies your servicing office that it has granted your request. If you ask for OPM to determine if there is a court order on file and OPM finds that there is no court order on file, your election will be effective on the first day of the month after OPM notifies your servicing office that it has no such court order.

Deductions

Deductions for FERS coverage for 1987 are 1.8 % of pay for FERS basic benefits and 5.7 % of pay up to $43,800 for the Old Age, Survivors, and Disability programs of Social Security. In case of CSRS offset coverage, the total deductions for CSRS offset and Social Security coverages equal the amount that would be withheld for full CSRS.

Crediting of service if you change coverage (See the special section of the *FERS Transfer Handbook* beginning on page 61 for details.)

- If you elect FERS coverage, your service after 1983 (which was subject to the special rules for certain Members and senior officials) will be credited under FERS rules. Credit for your additional civilian service depends on how much additional service you had. If it totals less than 5 years, it will be credited under FERS rules. If it totals 5 or more years it will be credited under CSRS rules.

- If you elect CSRS Offset, your service after 1983 (which was subject to the special rules for certain Members and senior officials) will be subject to CSRS Offset rules. Your additional civilian service will remain subject to the regular CSRS rules.

- If you elect either FERS or CSRS Offset and you paid full CSRS deductions (8%) for service that will be credited under FERS or CSRS Offset rules, you can apply for a return of the excess deductions.

- If you are not now covered under CSRS at all and you elect either FERS or CSRS offset coverage, you will be able to make a deposit in order to get credit for your service from January 1, 1984, until the effective date of your change to FERS or CSRS offset coverage.

See the *FERS Transfer Handbook* for more information about service credit under FERS and CSRS, including when deposits are required to get credit for service and whether refunds of prior deductions may be redeposited.

The Thrift Savings Plan

The Thrift Savings Plan (TSP) is available to Members who are covered by either FERS or CSRS. (If you choose not to be covered under either retirement system you cannot participate in the TSP.) The booklet ***Thrift Savings Plan*** (available through your servicing office) is the best source of information about TSP. See also "Thrift Savings Plan Nondiscrimination Test for High-Salaried Employees" on page 51 of the ***FERS Transfer Handbook***.

If you elect FERS coverage, the government contributes an amount equal to 1% of your pay to your TSP account each pay period. You have 30 days after the effective date of your FERS election to:

(1) elect to contribute to the Thrift Savings Plan if you are not now contributing, or

(2) change your contributions to the Thrift Savings Plan if you are already participating.

This opportunity is separate from the regular Thrift Savings Plan open seasons, which are held at least twice each year.

UNITED STATES COURT OF FEDERAL CLAIMS

Civil Docket No. 705-89 C

JUDGE TERRY J. HATTER, JR., JUDGE DUDLEY H. BOWEN, JR., et al., Plaintiffs,

v.

THE UNITED STATES OF AMERICA, Defendant.

DECLARATION OF DUDLEY H. BOWEN, JR.

DUDLEY H. BOWEN, JR., deposes and says:

1. I was appointed by President Carter, with the advice and consent of the United States Senate, as an Article III judge on November 27, 1979. I was sworn in December 5, 1979, and have served continuously until the present as a United States District Judge for the Southern District of Georgia.

2. I have personal knowledge of the facts set forth in this Declaration.

3. When I considered accepting my appointment as an Article III judge, I weighed carefully the financial consequences. I considered the salary of the office, as reduced by income tax and other deductions, my previously vested retirement benefits and the provisions for judicial retirement, which entailed no salary deduction. When I examined the financial aspects of the appointment, I made the specific inquiry to the Social Security Office and received confirmation that I had already made social security contributions for over forty quarters. Thus, I was assured that my social security entitlements were vested. I retained written evidence of my inquiry and the response from the Social Security Office prior to my appointment. I was aware of the Quadrennial Commission and provisions for increases in judicial compensation. I understood that my appointment

was for life during good behavior and that the Constitution guaranteed that my compensation would not be diminished. Taking these factors into account, I determined that the compensation of the office was acceptable.

4. At the time I accepted my appointment, no deductions were made from my salary for retirement. The salary of my office was not subject to deductions for social security, and my service as a judge was not to be credited toward social security benefits. The only mandatory deductions from my salary were for federal and state income tax. In addition, I elected a deduction for health insurance. I subsequently elected an additional deduction by enrolling in the Thrift Savings Plan.

5. Since January 1, 1984, my service as an Article III judge has been subject to dual retirement coverage. I am subject to both the statutory retirement provisions for Article III judges and social security. Before the January 1, 1984, social security deductions began, I wrote to the Director of the Administrative Office on December 22, 1983. A copy of that letter is appended hereto. My purpose in December of 1983 was to protest the deduction of social security contributions which diminished my compensation while in office. In response thereto, I received the letter of the general counsel for the Administrative Office of the United States Courts dated December 28, 1983, also appended hereto. Moreover, having been determined to be an active judge fully insured as of 12/31/82, I enclose herewith a page of a questionnaire which I returned to the Administrative Office of the United States Courts expressing my views on the matter.

6. I have never had an opportunity to elect a retirement system to cover my federal judicial service pursuant to the Federal Employees' Retirement System Act or any other statute.

7. I have never been provided with the right to elect an offset that would reduce the amount or economic burden of

my Social Security deductions pursuant to the Federal Employees' Retirement Contribution Temporary Adjustment Act or any subsequent statute.

8. In 1984, my compensation was reduced by $2,532.60 in social security deductions.

9. In 1985, my compensation was reduced by $2,791.80 in social security deductions.

10. In 1986, my compensation was reduced by $3,003.00 in social security deductions.

11. In 1987, my compensation was reduced by $3,131.70 in social security deductions.

12. In 1988, my compensation was reduced by $3,379.50 in social security deductions.

13. In 1989, my compensation was reduced by $3,604.80 in social security deductions.

14. In 1990, my compensation was reduced by $3,924.45 in social security deductions.

15. In 1991, my compensation was reduced by $5,123.30 in social security deductions.

16. In 1992, my compensation was reduced by $5,313.44 in social security deductions.

17. Through April 30, 1993, my 1993 compensation has been reduced by $4,232.36 in social security deductions.

18. I filed a request for refund with the Internal Revenue Service for my social security deductions for the 1987, 1988, 1989 and 1990. This refund request was years denied by the IRS on April 19, 1991.

19. Pursuant to 28 U.S.C.§1746, I declare under penalty of perjury that the foregoing is true and correct.

/s/ DUDLEY H. BOWEN, JR.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA

DUDLEY H. BOWEN, JR. JUDGE

December 22, 1983

Mr. William E. Foley
Director
Administrative Office of the
United States Courts
Washington, D.C. 20544

Dear Mr. Foley:

Please let me extend to you and your staff my best wishes for a very happy 1984.

On another note, please accept this letter as my formal and strong protest against the deduction of any social security tax or payment from my monthly compensation.

One very important consideration which I took into account when I decided to seek this position was the fact that I had already paid into the social security program for a period of over forty quarter years. Thus, I had already become entitled to social security payments.

Now, I am an Article III constitutional judge, and my compensation is about to be diminished while I am in office. Social security deductions will, in effect, require me to pay twice for an entitlement that I already own, much of which I will probably never receive.

Any social security deduction is unconstitutional.

With kindest regards, I remain

Sincerely,

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS
WASHINGTON, D.C. 20544

WILLIAM E. FOLEY
DIRECTOR
JOSEPH F. SPANIOL, JR.
DEPUTY DIRECTOR

WILLIAM M. NICHOLS
GENERAL COUNSEL

December 28, 1983

Honorable Dudley H. Bowen, Jr.
United States District Court
Post Office Box 2106
Augusta, Georgia 30903

Dear Judge Bowen:

Mr. Foley has asked me to acknowledge your correspondence of December 22, 1983, protesting the deduction from your judicial salary of Social Security taxes under the Federal Insurance Contributions Act, effective on January 1, 1984.

I can assure you that this protest has been duly noted here in the Administrative Office and that your letter will be preserved in our official personnel files in the event that it may assume future legal significance.

I certainly respect your position that the imposition of FICA taxes upon the salary of judges of the United States represents an unconstitutional diminution of your compensation. I trust that you also understand the situation in which we find ourselves, namely that section 101 of the Social Security Amendments of 1983 plainly expresses the legislative intent of Congress to bring justices and judges immediately within the coverage of the Social Security system as of the effective date of this Act. We do not deem that the Director is free to dis-regard this statutory direction, no matter how persuasive may be the legal theories that would support such action, in the absence of

corrective Congressional action or a judicial decision invalidating this aspect of the 1983 Amendments.

Thank you for your letter, and we shall follow with interest the course of any future legislative or judicial developments bearing upon this important issue.

Sincerely,

William M. Nichols
General Counsel

cc: R. Glenn Johnson

Bowen, Dudley, H

Active Judges Fully Insured a/o 12/31/82

1. Your social security earnings statement furnished by the Social Security Administration indicates that you were fully insured as of December 31, 1982. This means that, without any further coverage under the system, you are or will be entitled to retirement benefits of $405 per month at age 65; and if you then have a spouse age 62 or over, a spousal benefit.* If the spouse is then at least 65, the spousal benefit is approximately one-half your benefit amount (ranging down to 37.5 percent at 62).

2. Upon your death, a spouse age 65 or above who survives you would be entitled to your benefit amount. A surviving spouse under 65 but at least 60 would be entitled to a lesser amount (ranging down to 71.5 percent at 60).

3. If you remain in an active status for the remainder of 1984, you will pay $2,533 in FICA taxes, and your monthly retirement benefit will increase by approximately $ 30.*

4. Under current law you will continue to pay FICA taxes, which will increase your eventual retirement benefits, in each year you remain in an active status or, beginning in 1986 perform substantial judicial service as a senior judge. For each year of such service, the costs, and the increases in benefits, to you would increase marginally over those shown in paragraph 3.

Appointed Dec. 5, 1979 at age 38

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*The judicial salary of a judge in active service is considered "earnings" for social security purposes, and would preclude the payment of retirement benefits to the judge (and spousal benefits to the spouse) during any month in which the judge is in an active status and has not reached age 70. Under current law, and beginning January 1, 1986, senior judges are treated similarly with respect to "earnings" attributable to periods during which they perform judicial service.

One of the reasons I took a judicial appointment was that I was assured there would be no further contributions to Social Security. I already had 40 quarters of coverage (contributions). I requested and obtained a certificate to that effect. D.H. Bowen, Jr.

UNITED STATES COURT OF FEDERAL CLAIMS

Civil Docket No. 705-89 C

JUDGE TERRY J. HATTER, et al., Plaintiffs,

v.

UNITED STATES, Defendant.

DECLARATION OF A.J. McNAMARA

A.J. MCNAMARA deposes and says:

1. I was appointed by President Reagan, with the advice and consent of the United States Senate, as an Article III judge on June 21, 1982. I was sworn-in shortly thereafter and have served continuously until the present as a United States District Judge for the Eastern District of Louisiana.

2. I have personal knowledge of the facts set forth in this Declaration.

3. When I considered accepting my appointment as an Article III judge, I weighed carefully the financial consequences. I considered the salary of the office, as reduced by income tax and other deductions, my previously vested retirement benefits and the provisions for judicial retirement, which entailed no salary deduction. At the time, I had four children in high school and college and I was concerned about paying for their higher education. I knew I was taking a substantial pay cut in becoming a judge and it was important to my weighing of the financial consequences that there would be no deduction from my salary for Social Security. I was aware of the Quadrennial Commission and provisions for increases in judicial compensation. I understood that my appointment was for life during good behavior and that the Constitution guaranteed that my compensation would not be diminished. Taking these factors into account, I determined that the compensation of the office was acceptable.

4. At the time I accepted my appointment, no deductions were made from my salary for retirement. The salary of my office was not subject to deductions for Social Security and my service as a judge was not to be credited toward Social Security benefits. The only mandatory deductions from my salary were for federal and state income tax. In addition, I elected deductions for health insurance and life insurance. I enrolled in the Judicial Survivors' Annuity System in January 1993.

5. Since January 1, 1984, my service as an Article III judge has been subject to dual retirement coverage. I am subject to both the statutory retirement provisions for Article III judges and Social Security.

6. I have never had an opportunity to elect a retirement system to cover my federal judicial service pursuant to the Federal Employees' Retirement System Act or any other statute.

7. I have never been provided with the right to elect an offset that would reduce the amount or economic burden of my Social Security deductions pursuant to the Federal Employees' Retirement Contribution Temporary Adjustment Act or any subsequent statute.

8. In 1984, my compensation was reduced by $2,532.60 in Social Security deductions.

9. In 1985, my compensation was reduced by $2,791.80 in Social Security deductions.

10. In 1986, my compensation was reduced by $3,003.00 in Social Security deductions.

11. In 1987, my compensation was reduced by $3,131.70 in Social Security deductions.

12. In 1988, my compensation was reduced by $3,379.50 in Social Security deductions.

13. In 1989, my compensation was reduced by $3,604.80 in Social Security deductions.

14. In 1990, my compensation was reduced by $3,924.45 in Social Security deductions.

15. In 1991, my compensation was reduced by $5,123.30 in Social Security deductions.

16. In 1992, my compensation was reduced by $5,313.44 in Social Security deductions.

17. Through April 30, 1993, my 1993 compensation has been reduced by $4,232.36 in Social Security deductions.

18. I filed a request for refund with the Internal Revenue service for my social security deductions for the years 1987, 1988, 1989 and 1990. This refund request was denied by the IRS on April 8, 1991.

19. Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Dated: May 17, 1993 /s/ A.J. McNamara

UNITED STATES COURT OF FEDERAL CLAIMS

Civil Docket No. 705-89 C

JUDGE TERRY J. HATTER, et al., Plaintiffs,

v.

UNITED STATES, Defendant.

DECLARATION OF HENRY A. MENTZ, JR.

HENRY A. MENTZ, JR. deposes and says:

1. I was appointed by President Reagan, with the advice and consent of the United States Senate, as an Article III judge on June 25, 1982. I was sworn-in shortly thereafter and have served continuously until the present as a United States District Judge for the Eastern District of Louisiana.

2. I have personal knowledge of the facts set forth in this Declaration.

3. When I considered accepting my appointment as an Article III judge, I weighed carefully the financial consequences. I considered the salary of the office,, as reduced by income tax and other deductions, my previously vested retirement benefits and the provisions for judicial retirement, which entailed no salary deduction. Before accepting my appointment, I discussed these financial consequences with my accountant and we agreed that one of the factors making a judicial appointment attractive was that no deductions would be made from my salary for Social Security. I was aware of the Quadrennial Commission and provisions for increases in judicial compensation. I understood that my appointment was for life during good behavior and that the Constitution guaranteed that my compensation would not be diminished. Taking these factors into account, I determined that the compensation of the office was acceptable.

4. At the time I accepted my appointment, no deductions were made from my salary for retirement. The salary of my office was not subject to deductions for Social Security and my service as a judge was not to be credited toward Social Security benefits. The only mandatory deductions from my salary were for federal and state income tax. In addition, I elected deductions for health insurance and life insurance. I also enrolled in the Judicial Survivors' Annuity System in December, 1992.

5. Since January 1, 1984, my service as an Article III judge has been subject to dual retirement coverage. I am subject to both the statutory retirement provisions for Article III judges and Social Security.

6. I have never had an opportunity to elect a retirement system to cover my federal judicial service pursuant to the Federal Employees' Retirement System Act or any other statute.

7. I have never been provided with the right to elect an offset that would reduce the amount or economic burden of my Social Security deductions pursuant to the Federal Employees Retirement Contribution Temporary Adjustment Act or any subsequent statute.

8. In 1984, my compensation was reduced by $2,532.60 in Social Security deductions.

9. In 1985, my compensation was reduced by $2,791.80 in Social Security deductions.

10. In 1986, my compensation was reduced by $3,003.00 in Social Security deductions.

11. In 1987, my compensation was reduced by $3,131.70 in Social Security deductions.

12. In 1988, my compensation was reduced by $3,379.50 in Social Security deductions.

13. In 1989, my compensation was reduced by $3,604.80 in Social Security deductions.

14. In 1990, my compensation was reduced by $3,924.45 in Social Security deductions.

15. On November 10, 1990, I became 70 years old and my compensation was no longer reduced by Social Security deductions. At that time, I began receiving Social Security benefits.

16. I filed a request for refund with the Internal Revenue Service for my Social Security deductions for the years 1987, 1988, 1989 and 1990. This refund request was denied by the IRS on April 8, 1991.

17. Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Dated: June 18, 1993 /s/ HENRY A.J. MENTZ, JR.

UNITED STATES COURT OF FEDERAL CLAIMS

Civil Docket No. 705-89 C

JUDGE TERRY J. HATTER, et al., Plaintiffs,

v.

UNITED STATES, Defendant.

DECLARATION OF MICHAEL M. MIHM

MICHAEL M. MIHM deposes and says:

1. I was appointed by President Reagan, with the advice and consent of the United States Senate, as an Article III judge on August 5, 1982. I was sworn-in shortly thereafter and have served continuously until the present as a United States District Judge for the Central District of Illinois.

2. I have personal knowledge of the facts set forth in this Declaration.

3. When I considered accepting my appointment as an Article III judge, I weighed carefully the financial consequences. I considered the salary of the office, as reduced by income tax and other deductions, my previously vested retirement benefits and the provisions for judicial retirement, which entailed no salary deduction. The financial consequences of accepting a judicial appointment were especially important to me and my family because I had spent my career as a lawyer in the public service, rather than in private practice. I was also concerned about paying for the college education of my four children on a judge's salary. Before accepting the appointment, my wife and I sat down at our kitchen table and discussed these financial circumstances, including the fact that I would not have amounts deducted from my pay for Social security. I was aware of the Quadrennial Commission and provisions for increases in judicial compensation. I understood that my appointment was for life during good behavior and that the

constitution guaranteed that my compensation would not be diminished. Taking these factors into account, I determined that the compensation of the office was acceptable. I am not saying that I would not have become a federal judge if social security was being deducted at the time I went on the bench. I am saying that because we had (and have) 4 children to educate, and no accumulated wealth, the fact that social security payments would not be deducted was a specific factor discussed by my wife and I regarding whether I could financially afford to support and educate my family on the salary provided.

4. At the time I accepted my appointment, no deductions were made from my salary for retirement. The salary of my office was not subject to deductions for social Security and my service as a judge was not to be credited toward Social security benefits. The only mandatory deductions from my salary were for federal and state income tax. In addition, I elected health insurance and life insurance. I also elected deductions for the Thrift Savings Plan beginning in January, 1993.

5. Since January 1, 1984, my service as an Article III judge has been subject to dual retirement coverage. I am subject to both the statutory retirement provisions for Article III judges and Social Security.

6. I have never had an opportunity to elect a retirement system to cover my federal judicial service pursuant to the Federal Employees' Retirement System Act or any other statute.

7. I have never been provided with the right to elect an offset that would reduce the amount or economic burden of my Social Security deductions pursuant to the Federal Employees' Retirement Contribution Temporary Adjustment Act or any subsequent statute.

8. In 1984, my compensation was reduced by $2,532.60 in Social Security deductions.

9. In 1985, my compensation was reduced by $2,791.80 in Social Security deductions.

10. In 1986, my compensation was reduced by $3,003.00 in Social Security deductions.

11. In 1987, my compensation was reduced by $3131.70 in Social Security deductions.

12. In 1988, my compensation was reduced by $3,379.50 in Social Security deductions.

13. In 1989, my compensation was reduced by $3,604.80 in Social Security deductions.

14. In 1990, my compensation was reduced by $3,924.45 in Social Security deductions.

15. In 1991, my compensation was reduced by $5,123.30 in Social Security 'deductions.

16. In 1992, my compensation was reduced by $5,313.44 in Social Security deductions.

17. Through April 30, 1993, my 1993 compensation has been reduced by $4,232.36 in Social Security deductions.

18. Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Dated: June 7, 1993 /s/ Michael M. Mihm

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS
WASHINGTON. D.C. 20344
December 10, 1982

WILLIAM E. FOLEY
DIRECTOR

JOSEPH F. SPANIOL, JR.
DEPUTY DIRECTOR

MEMORANDUM TO THE CHIEF JUSTICE

SUBJECT: Constitutionality of Medicare Tax as Applied to Justices and Judges

Section 278 of the Tax Equity and Fiscal Responsibility Act of 1952, Public Law No. 97-248, 96 Stat. 324, applies to Federal employment the coverage of medicare and the consequent "hospital insurance tax" as of January 1, 1983. It effects this purpose by amendments to the Social Security Act and the Federal Insurance Contributions Act (FICA). Section 3101 (b) of the latter Act (26 U.S.C. § 3101 (b)) is the source of the hospital insurance tax, imposing "on the income of every individual a tax equal to the following percentages of the wages... received by him with respect to employment...."

It seems apparent from this statutory scheme that the medicare hospital insurance tax is basically an income tax. This tax is a part of the mechanism to finance the Social Security system. In the early days of the Social Security Act, the Supreme Court described its Title VIII as laying "a special income tax upon employees to be deducted from their wages and paid by the employers." *Helvering v. Davis*, 301 U.S. 619, 634 (1937). More recently it has been reaffirmed that section 3101 of FICA "imposes both an income tax on individuals with respect to their employment and an excise tax on employers. . . ." *Avis Rent-A-Car System, Inc. v. United States*, 364 F. Supp. 605, 608 (E.D. N.Y. 1973), *rev'd on other grounds*, 503 F.2d 423 (2nd Cir, 1974).

Given the essential character of this medicare tax as an income tax, its application to the Judiciary appears consistent with precedent respecting the amenability to income taxation of the salaries of judges appointed under Article III. In *O'Malley v. Woodrough*, 307 U.S. 277 (1939), it was held that the imposition upon judicial income of a non-discriminatory tax laid generally on net income is not an unconstitutional diminution of Federal judicial salaries and that Article III, sec. 1, does not create a judicial immunity from the incidence of such taxation. 307 U.S. at 282. *Accord, United States v. Will*, 449 U.S. 200, 227 n.31 (1980).

/s/ William E. Foley

January 1985

FEDERAL JUDGES AND SOCIAL SECURITY
A REPORT

Administrative Office
of the
United States Courts

Background

Public Law No. 98-21, the Social Security Amendments of 1983, was enacted against a background of extended public debate over the means of addressing a funding crisis in social security programs providing retirement and disability benefits to workers and their survivors. The debate examined divergent views concerning an estimated funding shortfall, and the wisdom of remedies consisting of reductions in benefits and increases in revenues. While remedial congres-sional action was acknowledged to be imperative, it was also recognized to be complex and difficult.

In January 1983, the bipartisan National Commission on Social Security Reform (Greenspan Commission) agreed to a comprehensive, delicately-balanced set of proposals, embodying a compromise solution to the congressional impasse. The Commission's recommen-dations served as a catalyst for legislative action and became the blueprint for the Social Security Amendments of 1983.

Confronted with the prospect that social security payments would be suspended within a matter of weeks, and recognizing that the package proposed by the Greenspan Commission would probably unravel if too many of its compromise elements were rejected, Congress placed the Commission proposals on a fast legislative track. As a results the 1983 amendments were enacted within two months, an unprecedented feat for legislation having universal impact and promising potential controversy. The enacted bill contained substantially all of the Commission's proposals. In addition, several new provisions were added during the brief period of congressional consideration. Apparently unintended consequences of two of the added provisions necessitate this report.

Social Security and Federal Employees

The Greenspan Commission proposed that new Federal employees be covered under the social security system. Congress adopted that recommendation for employees entering the Federal work force on and after January 1, 1984. The obvious justification for this extension of coverage was that of providing an immediate and substantial increase in social security revenues from a group for whom payment of benefits would not materialize for many years.

The House Ways and Means Committee approved a bill (H.R. 1900) which *further* extended social security coverage, effective January 19 1984, to small groups of *incumbent* Federal officials and employees. Included were the President, Vice President, Members of Congress, presidential and other political appointees in the Executive Branch, and justices, judges and magistrates in the Judicial Branch. The rationale for including these officials in that manner is unclear. The Greenspan Commission had not proposed that *incumbent* officials and employees be brought under social security. The total number of such individuals affected by H.R. 1900 was realistically too small for their inclusion to have a substantial Impact on system revenues. The rationale for folding a relative handful of incumbent executive, legislative and judicial officials into social security can perhaps best be gleaned from the testimony of House Majority Leader Jim Wright before the Ways and Means Committee; Mr. Wright there stated that inclusion of all members of Congress would be a "symbolic" gesture of commitment to keeping the social security system solvent.

Social Security and Senior Judges

During its consideration of the provision placing a limited number of incumbents under social security, the Ways and Means Committee adopted an amendment offered by

Congressman Henson Moore which further extended social security coverage to *retired* justices and Judges during periods in which they render judicial service pursuant to 28 U.S.C. § 294. Such judges are designated in 28 U.S.C. § 294(b) and throughout this report as "senior judges." The term is not used here to include those few judges who retire from their offices pursuant to 28 U.S.C. § 371(a), but only those who "retire from regular active service" pursuant to 28 U.S.C. § 371(b).

The Moore amendment, on its face, was premised upon a degree of logic. Ordinarily, retirees who return to work even temporarily, are subject to social security taxation. Wages they earn may disqualify them from receiving social security benefits for which they are otherwise eligible. Extension of this logical concept to justices and judges, however, overlooked the constitutional provision governing judicial compensation and an established tradition of continued service by "retired" (or senior) judges. That oversight has created a serious threat to the continued efficient and economical functioning of the judicial system.

The Judicial Retirement System

Judges are eligible for retirement under the following age and service criteria:

Attained age:	Years of service:
65	15
66	14
67	13
68	12
69	11
70	10

A judge who meets the above criteria may *either*: (a) retire from judicial office, in which case he will continue to receive the salary of the office payable at the time of his retirement; or (b) retain the office but retire from active service, in which case he

will continue to receive the salary of the office. A judge who chooses the latter option becomes a "senior" judge and may, with his consent, be designated to perform further judicial service. In the past two decades nearly 90 percent of the judges electing "senior status retirement" have continued to render substantial judicial service. In the year ending June 30, 1984, senior judges made contributions equivalent to that of 21 active circuit judges and 52 active district judges, as shown in Table 1.

Another form of voluntary service significant in the effective functioning of the judicial system is that rendered by judges who continue in active service beyond their retirement eligibility dates. At the end of 1980, 47 active judges were eligible to retire. Twenty-one of them are still in active service, and the twenty-six who chose to retire had provided an average of over five years of active service beyond their retirement eligibility dates. Traditionally, many judges have chosen to remain in active status, health permitting, even though retirement would provide them with a greater degree of control over their workloads and relief from administrative burdens of court management.

The Legislative Aftermath

Soon after the enactment of the 1983 social security amendments Congress perceived the need to address two Federal employee-related problems created by that landmark legislation.

Coverage of Retired Judges. First, there was the serious adverse potential of Section 101(c) of the Social Security Amendments, which, as explained *supra*, extended social security coverage to *senior* judges who voluntarily perform judicial service.

In the late spring and summer of 1993, there was a growing recognition within and without Government circles that, since senior Federal judges are entitled to their salaries whether or not they do judicial work, mandated social security coverage

for those who do choose to work amounts to a financial penalty for voluntary services. To correct this perceived inequity, several members of Congress introduced bills which would have repealed Section 101(c) of the 1983 amendments. Among them was Congressman Henson Moore, the original sponsor of that section, who commented as follows—

> Mr. Speaker, today I am introducing a bill to correct a problem which arose as a result of language In the recently enacted Social Security Amendments of 1983, Public Law 98-21.
>
> In that legislation, we provided for social security coverage, starting January 1, 1984, for Federal judges. Our intention was to insure that this group of Government officials would be covered essentially in the same way as Members of Congress and appointed officers of the executive branch. We were striving for equity, but in the process we achieved an unintended result.
>
> This result is, in effect, a penalty on senior judges, who have retired but who return to active service from time to time to help meet workload needs of the Federal judiciary. When these retired judges do return to the bench in the future, they will be required to pay social security payroll taxes. This understandably will have an adverse impact on their decision to return to active service, and we certainly did not intend that consequence when we agreed to extend social security coverage to Federal judges generally.
>
> The bill I am introducing today would correct this situation by exempting the computation of these retired, senior judges from the social security payroll tax when they do return temporarily to active service.

Cong. R., June 30, 1983, E3296.

The Executive Committee of the Judicial Conference of the United States, among others, was not so certain that social security coverage of senior judges would constitute an unmitigated disincentive to further judicial service. They reasoned that the benefits and burdens of social security coverage vary from one individual to another depending upon such factors as age, health, family situations and previously earned wage credits under the system. Accordingly, there was merit to delaying the impact of Section 101(c), as opposed to repealing it, until the effects of social security coverage on each of the more than 200 senior Judges could be determined.

The more cautious approach prevailed in the Congress and was embodied in enactment on October 11, 1983, of the Federal Supplemental Compensation Act of 1982 Extension. Sec. 4, Pub. L. No. 98-118. That section postponed coverage of senior judges until January 1, 1986. The two-year postponement afforded time for study of the probable effects of social security coverage upon judicial service rendered by senior judges. That study has been completed and the results are set forth in this report.

Double Deductions. The second problem stemming from the 1983 amendments which drew congressional attention was the heavy payroll deduction burden imposed upon all new Federal employees and those incumbent officers and employees who had been folded into the social security system. Social security coverage meant that these individuals would contribute FICA taxes (6.7% of the social security base in 1984, increasing by increments to 7.65% in 1990[1]) in addition to the required 7% contribution (8% for members of

[1] Figures include the Medicare segment of FICA, 1.3% in 1984. This portion of the FICA tax was imposed upon all Federal employees by the Tax Equity and Fiscal Responsibility Act of 1982. Medicare coverage is not discussed in this report.

Congress and some others) to the civil service retirement system. Further, social security benefits overlapped to some extent civil service retirement benefits.

The double deduction problem was addressed by Congress in the Federal Employees Retirement Contribution Temporary Adjustment Act of 1983, Title II, Public Law No. 98-168. With respect to new Federal employees, the civil service contribution rate was reduced to 1.3% during 1984 and 1985 to allow Congress time to enact a new civil service retirement system. With respect to incumbent employees, the problem was more complex because many of them had a substantial investment in civil service retirement and, presumably, in estate plans which did not anticipate social security coverage. In order to afford these individuals some flexibility in adjusting to the 1983 amendments pending enactment of a new civil service retirement system, Congress provided three options. The affected employees could: (1) terminate their civil service retirement participation and obtain a refund of past contributions, (2) continue participation in the civil service system at the regular contribution rates, or (3) continue participation in the civil service system at the reduced contribution rate applicable to new employees (1.3%). Under the latter option civil service retirement credit for service at the reduced contribution rate is allowed only if the employee deposits the difference between the normal contribution rate and 1.3%.

The Retirement Contribution Temporary Adjustment Act provided a measure of relief for almost all of the groups of incumbent officers and employees who were folded into social security coverage by the 1983 amendments, including magistrates, bankruptcy judges and other judges serving under term appointments. Justices and judges appointed pursuant to Article III of the Constitution for life were not affected, however, because they are not members of the civil

service retirement system and do not make contributions to it.[2]

Impact of Social Security—
Cost and Benefit Analysis

Methodology. Early in 1984 the Administrative Office of the United States Courts asked each Article III judge who held office on April 20, 1983, to authorize the Social Security Administration (SSA) to provide to the Administrative Office his or her social security earnings history for the years 1951-1982. These are the years for which SSA maintains automated earnings records, susceptible to prompt retrieval. Authorizations were provided by 582 judges in active service, 88% of the total, and by 196 senior judges, 92% of the total. The authorizations were submitted to the SSA, which in due course provided to the Administrative Office magnetic tapes containing the requested figures for each judge.

Printouts of the taped data were furnished to Robert J. Myers, who had been retained as a consultant by the Administrative Office to provide the requisite analysis. Mr. Myers is a former Chief Actuary and Deputy Commissioner of the Social Security Administration and also served as the Executive Director of the National Commission on Social Security Reform (the Greenspan Commission). Copies of the individual printouts were provided to each judge concerned. Upon review of the printouts, a few judges were alerted to errors in the SSA data which they were able to have corrected on the strength of documentary evidence available to them. In those cases the corrected figures were used in Mr. Myers' study.

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[2] Many Judges do contribute 4-1/2% of their salaries to the Judicial Survivors Annuity System. 28 U.S.C. § 376. The benefits for survivors under that system also overlap social security benefits to some extent, but Congress provided no relief from that aspect of the double deduction problem. See Pub. L. No. 98-168.

Mr. Myers determined for each judge—

- whether he or she had earned enough quarters of social security coverage (as the result of pre-judicial employment) to become fully insured for benefits at retirement age and, if not, how many additional quarters would be needed;
- the approximate monthly retirement, spousal and survivor social security benefit payable at age 65 or such later age as would permit the judge to earn the necessary quarters of coverage for fully insured status; and
- the approximate annual cost in FICA taxes and the approximate increase in monthly benefits resulting from each additional year of work under the social security system after fully insured status is attained.

Previous participation in the social security system is reflected in Table 2 for senior judges and Table 3 for judges in active service. The most significant fact reflected in these tables is that, as of the end of 1982, 66% of senior judges and 95% of judges in active service had attained fully insured status. The importance of fully insured status for any worker is that, once retirement age is reached, continued work may be attended by adverse financial consequences. First, continued work at any age is subject to FICA taxation. Second, earnings from continued work may bar eligibility for social security retirement benefits because of the "earnings test." In 1985 a worker under age 65 may earn no more than $5,400 per year, and a worker between ages 65 and 70 no more than $7,320 per year, without reduction of the social security retirement benefit at the rate of a $1 reduction for each $2 of earnings above the specified amounts. As applied to judges, these provisions mean that *every* judge in active service, and *every* senior judge who performs a significant amount of judicial service on and after January 1, 1986, will pay *maximum* FICA

taxes and will *not* be eligible for *any* social security benefits otherwise payable, unless he or she has reached age 70. Since the salaries of judges are not subject to diminution so long as they hold their offices, the central question for every judge is: whether the reasonably expectable future benefits for themselves or their survivors will equal or exceed the costs to them in FICA taxes plus, in many cases, the forfeiture until age 70 of benefits previously earned.

The results of Mr. Myers' computations vividly confirm that the cost-benefit relationships of social security coverage vary widely among individual judges—and that the two-year postponement of coverage for senior judges was prudent. The wide variance among individuals can be illustrated by two sets of examples from the Myers study—

1. *Senior judges*

(a) Senior Judge V. is now 66 and is receiving a social security retirement benefit of $6,390 per year as a result of social security coverage before becoming a judge. He currently carries nearly a full case load and had planned to continue that level of work for a number of years, his health permitting. Current law, however, provides Judge V. with a strong financial incentive to relinquish his judicial role. For each year of continued service beginning in 1986 he would pay about $2,500 in FICA taxes and, until he reaches age 70, forfeit at least $6,390 in earned benefits. Each year of such continued service would, of course, result in an enhancement of Judge V.'s eventual social security retirement benefit. In his case, however, continued judicial service in 1986 would cost him about $9,000 and the resultant enhancement in his social security benefit would only amount to about $600 per year. It is not surprising that Judge V. has indicated that, unless the current law is amended, he will perform no judicial service after 1985.

(b) Senior Judge B. is now 65 and had limited social security coverage prior to his judicial appointment. He needs 16 additional quarters of social security participation to acquire fully Insured status. Under current law four years of continued judicial service beginning in 1986 would give him the necessary coverage by the end of 1989, when he will have reached age 70. He would then be eligible for a social security retirement benefit of about $5,000 per year. The "cost" would consist of the FICA taxes paid in the years 1986-1989, or about $10,000. Assuming that Judge B. is in reasonably good health, additional social security coverage is an actuarially sound "'investment" and he will have an incentive to continue his voluntary performance of judicial service.

2. *Judges in active service*

(a) District Judge L. is now 61 and worked under social security coverage for more than thirty years prior to his appointment to the Federal bench In 1979. At that time he was serving under a lifetime appointment in his State's judiciary. He was reluctant to accept the Federal appointment because the survivor benefit system provided for State judges was much more adequate than that for Federal judges and was without cost (in contrast to the 4-1/2% payroll deduction in the Federal system). The decisive element in his decision to accept the Federal appointment was the fact that the contributions he had been making to the social security system could be used to offset, in part, the new contributions required for a Federal survivor annuity and the cost of additional life insurance needed to supplement that annuity. Based on his past coverage, Judge L. will be entitled to a social security basic retirement benefit of about $7,700 at age 65 plus a spousal benefit of about one-half of that amount. He will not be eligible for senior status as a Federal judge

until 1991 at age 68. Under current law he will by that time have paid about $25,000 in additional FICA taxes but his social security retirement and survivor benefits will have increased only marginally over those already earned. Judge L. feels that his estate plans have been disrupted unfairly and is exploring the possibilities of reappointment to the State bench.

(b) Circuit Judge C. is now 68 and has served on the Federal bench for 18 years. Prior to his judicial appointment he had enough social security coverage to acquire fully insured status and would now be receiving a retirement annuity but for the "earnings test." A few years of additional participation in the social security system would appear to offer a financial advantage to Judge C. in that each such year of FICA contribution would result in a disproportionate increase of about $1,560 in his annual retirement benefit. The large increase in benefit is attributable to the facts that his pre-judicial coverage was limited in duration and that he will earn a 3% increase in benefits for each year he delays his retirement beyond the normal retirement age of 65. Under these circumstances Judge C. is motivated to postpone the retirement for which he is now eligible, at least for a few years.

(c) District Judge A. is now 57 and was appointed to the Federal bench in 1982. Prior to his appointment he had many years of social security-covered employment; in this respect he is more typical of active judges than is Circuit Judge C. in the preceding example. At age 65 Judge A. would, but for the earnings test, be entitled to a social security retirement benefit of about $8,580 per year, and his wife would be entitled to a spousal annuity of about one-half of that amount. He will be eligible to take

senior status in 1995 when he is 68. He will then have a strong financial disincentive—about $15,000 per year—to remaining in active status or performing judicial service in senior status. Understandably, Judge A. has indicated that this prospect will cause him to retire as soon as he is eligible and to perform no judicial service thereafter.

The Judicial Response

In July 1984, each judge participating in the social security study was provided the results of the Myers' analysis of his or her social security status (see pp. 11- 13, above), and was asked to complete a questionnaire designed to determine the effects of social security coverage upon Federal judicial service. Of the senior judges for whom Mr. Myers had earnings histories, 148, or 75%, responded to the questionnaire. Responses from active judges totaled 426, or 73% of those who received questionnaires. The results are reflected in Tables 4 and 5.

The questionnaire results clearly forecast a serious "judge-power" crisis for the courts beginning in late 1985 and continuing indefinitely thereafter. Over 65% of the *senior* judges will, if the current social security law remains in effect, contribute either less judicial service or no judicial service at all after 1985. Equally disturbing is the fact that more than one-half of the active judges would be motivated, under current law, to retire at the earliest date of eligibility and to perform little or no judicial service thereafter. In sum, the study establishes that *mandatory* social security coverage for those serving as judges in April of 1983 threatens to undermine a valuable tradition of voluntary service by both active and retired judges.

Not all judges found that social security coverage would serve as a disincentive to continued judicial service, however. A minority of both active and senior judges, 19% and 18%,

respectively, indicated that they would elect to remain under social security coverage if such coverage were made optional (see Tables 4 and 5). While those percentage figures are relatively small, they reflect the views of more than 100 serving judges.

The Fairness Issue

Like other incumbent officers and employees who were "folded into" the social security system by the Social Security Amendments of 1983, Federal judges in office before April 20, 1983, were the victims of a change in the rules in the middle of the game. But unlike other incumbents—judges were not afforded even the partial relief provided by the Federal Employees' Retirement Contribution Temporary Adjustment Act of 1983. (See pp. 8-10, supra.) For judges, the language of the Conference Committee report on that legislation is ironic—

> A second important modification permits current employees to make elections concerning coverage. Although the Social Security Amendments of 1983 (P.L. 98-21) generally provide that only Federal employees hired after December 31, 1983, will be covered by social security (and therefore face a double coverage situation), certain current officers and employees and current Members and judges will also be brought under social security effective January 1, 1984. Individuals in this affected group who are participants in a covered retirement system will be double covered effective January 1, 1984. The affected group includes the President and Vice President, Members of Congress, individuals in Executive Schedule positions (e.g., cabinet secretaries, deputy and assistant secretaries, heads and top officials of other agencies, boards and commissions, and other top officials), noncareer members of the Senior Executive Service and Senior Foreign Service, top officials in the White House and judges.

> Unlike newly hired employees who may elect whether or not to accept Government employment and face the uncertainties of a yet-to-be-established supplemental retirement program, the affected group has no election other than to resign (which in many instances would involve resignations from elected offices, lifetime judicial appointments, or presidentially appointed and Senate-confirmed positions). Also, unlike most newly hired employees, many in the affected group have made a substantial investment in, and have earned substantial credits under, their current covered retirement systems. For these individuals, the rules are beeing changed in the middle of the game. The conferees believe this is unfair, and the conference agreement permits certain elections by individuals in the affected group in order to mitigate the unfairness.

The unfairness which the Conference Committee thus perceived, but which the legislation did not address, is particularly acute in the case of judges. They are appointed relatively late in life,[3] usually in the full stream of successful careers. Many of them give up opportunities for much larger monetary compensation in exchange for the rewards of judicial service, compensated in a material way only by a judicial salary which continues during good behavior. Once appointed, retirement income was no longer a factor in their financial planning, but most of them found it necessary to make heavy financial commitments to provide benefits to their survivors. Those arrangements were severely impacted by the imposition of a substantial annual levy in the form of taxes imposed under the social security system, the centerpieces of which are an old-age benefit that most judges do not need and survivor benefits for which they had made other arrangements.

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[3] In the years 1980-1984, the average age at appointment was 50.

The Social Security Amendments of 1983 raise the possibility of yet another financial penalty on voluntary judicial service. In many jurisdictions, the salaries of senior judges—like the retirement annuities of other persons—are exempt from State and municipal taxation on incomes. In the case of retired Federal judges the rationale for this exemption is that, since eligibility for salary is not conditioned upon the performance of service, the judicial salary is not earned income. The continuance of these State and local exemptions is highly unlikely in the face of a Federal law which characterizes the salary of senior judges who perform judicial service as "wages" for social security purposes.

Conclusion

For most judges, coverage under the social security system constitutes a significant financial disincentive to voluntary judicial service. Further, the sudden imposition of social security coverage upon *sitting* judges on April 20, 1983, was fundamentally unfair to most of them. Unless Congress provides remedial legislation, a substantial number of new judgeships will be needed at a cost far exceeding the FICA revenue to be derived from judges in office upon the enactment of the 1983 amendments.

To provide equity to the judges afffected, and to maximize the incentive for voluntary judicial service, Congress should provide that social security coverage is optional for senior judges and for those judges who were in active service on or before April 20, 1983.

[Note: Schedule omitted in printing]

Senior Judges

Pre-Judicial Covered Earnings

Year of Birth	*Fully Insured*	*Not Fully Insured* *Number*	*Not Fully Insured* *Average Age to Acquire Necessary Quarters of Coverage*
1893 (and earlier)	1	1	99
1895	1	1	93
1896	0	1	92
1897	3	0	—
1898	2	0	90
1899	1	3	90
1900	1	3	88
1901	3	3	88
1902	2	5	88
1903	4	4	86
1904	7	3	86
1905	4	8	84
1906	11	1	83
1907	8	4	82
1908	3	2	82
1909	7	4	81
1910	4	6	79
1911	9	6	79
1912	15	2	78
1913	13	3	76
1914	10	0	—
1915	6	1	74
1916	5	2	72
1917	5	2	70
1918	4	0	—
1919	1	1	69
Totals	130 (66%)	66 (33%)	

Active Judges

Pre-Judicial Covered Earnings

Year of Birth	*No. Fully Insured*	*Not Fully Insured*	
		Number	*Quarters Needed*
1905	1	0	—
1906	1	1	20
1909	1	0	—
1910	3	0	—
1911	1	1	24
1912	2	0	—
1913	0	1	24
1914	7	1	25
1915	7	0	—
1916	18	1	23
1917	8	0	—
1918	17	1	29
1919	16	2	8, 20
1920	36	4	6, 14, 15, 16
1921	28	2	6, 7
1922	40	2	12, 20
1923	33	2	7, 34
1924	32	0	—
1925	31	0	—
1926	23	0	—
1927	20	1	38
1928	26	0	—
1929	27	0	—
1930	21	0	—
1931	30	0	—
1932	13	2	16, 40
1933	16	0	—
1934	17	2	12,20
1935	10	0	—
1936	18	0	—
1937	10	0	—

Active Judges

Pre-Judicial Covered Earnings

Year of Birth	*No. Fully Insured*	*Not Fully Insured*	
		Number	*Quarters Needed*
1938	12	0	—
1939	4	1	20
1940	6	2	8, 36
1941	4	1	11
1942	6	0	—
1943	4	0	—
1944	2	0	—
1946	1	0	—
1948	0	1	36
1950	1	1	10
Totals	553 (95%)	29 (5%)	

Senior Judges

(1) *Judicial Service by Designation*

If, after December 31, 1985, social security coverage is extended to senior judges during periods they perform judicial service, as provided in current law, I would:

(a) render more judicial service than at present 1

(b) render about the same amount of judicial service as I do now 50

(c) render less judicial service than I do now 19

(d) render no further judicial service 78

(2) *Optional Social Security Coverage*

If social security coverage is made optional for senior judges, I:

(a) will elect to be covered 27

(b) will not elect to be covered 117

Active Judges

(1) *Optional Social Security Coverage*

If social security coverage is made optional for judges, I:

(a) will elect to be covered 81

(b) will not elect to be covered 345

(2) *Retirement Planning*

Assuming that when I reach eligibility for senior status, social security coverage extends to judges in active status and to senior judges during periods they perform judicial service pursuant to designation, such coverage would:

(a) probably cause me to retire as soon as I am eligible and to perform little or no judicial service thereafter 230

(b) probably cause me to retire as soon as I am eligible, but would not dissuade me from performing a substantial amount of judicial service 23

(c) probably cause me to postpone my retirement, or to perform substantial judicial service while in senior status in order to earn additional quarters of social security coverage 8

(d) probably not be a significant factor in my retirement decision 163

(e) has already been a factor in my retirement plans 2

UNITED STATES COURT OF FEDERAL CLAIMS

Civil Docket No. 705-89 C

JUDGE TERRY J. HATTER, et al., Plaintiffs,

v.

THE UNITED STATES OF AMERICA, Defendant.

DECLARATION OF THOMAS HORST

I, Thomas Horst, hereby declare and state as follows:

1. I am a Managing Director of the economic consulting firm of Horst, Frisch, Clowery & Finan Incorporated, 2445 M Street, NW, Suite 200, Washington, DC 20037.

2. I have personal knowledge of the facts set forth in this Declaration.

3. My firm was retained to calculate the amount of interest due on each plaintiffs' damages claim in this case.

4. I calculated the total amount of Social Security withholding for each plaintiff from copies of plaintiffs' W-2 forms for the relevant years.[1]

5. I was instructed to deem the amounts of compensation owed plaintiffs to have been paid on April 15 of the year following the year in which the social security deductions had been withheld, *e.g.*, the amounts by which plaintiffs' compensation was diminished in 1990 would be deemed paid on April 15, 1991. I was then instructed to calculate interest

[1] I have been informed by plaintiffs' counsel that Judge Terence T. Evans was elevated to the United States Court of Appeals for the Seventh Circuit on August 14, 1995. Because of the Judge's appointment to the appellate court in 1995, for that year, I was asked to calculate the amount of interest for Judge Evans based on the amount of his Social Security withholdings for the first 8 1/2 months of that year.

compounded annually at a rate indexed to the 52-week Treasury Bill, at the auction date nearest to April 15 of each year following the year in which the amounts had been withheld.[2]

6. Based on this methodology, I used the following interest rates as published by the Department of Treasury:

Year Amounts Deemed Paid	52-Week Treasury Bill Interest Rate	Date of Auction
1984	10.81%	4/12/84
1985	9.15%	4/11/85
1986	6.31%	4/10/86
1987	6.30%	4/9/87
1988	7.01%	4/7/88
1989	9.31%	4/6/89
1990	8.32%	4/5/90
1991	6.26%	4/4/91
1992	4.55%	4/2/92
1993	3.37%	4/6/93
1994	5.02%	4/28/94
1995	6.28%	4/27/95
1996	5.60%	4/25/96

7. Based upon these interest rates and the amount of each plaintiffs' Social Security withholding as evidenced by each plaintiffs' W-2 forms, I have calculated the total amount of compounded interest due each plaintiff as off January 15, 1997. The attached charts reflect my calculations. *See* Attachments 1-16.

8. Based on these calculations, each plaintiff's damages plus interest in this case are as follows:

[2] For the Social Security withholding in 1996, I was instructed to deem those payments made on January 15, 1997. Accordingly, I calculated interest at a rate equal to three-quarters of the 52-week T-bill rate on April 25, 1996, or 4.20 percent (*i.e.*, 5.60% x 3/4).

Name	Compensation	Compounded Interest	Compounded Damages
Judge Arceneaux	$36,616.34	$18,303.54	$54,919.88
Judge Baker	$44,110.63	$19,226.72	$63,337.35
Judge Beer	$42,145.90	$19,015.63	$61,161.53
Judge Bowen	$55,989.64	$19,502.13	$75,491.77
Judge Burciaga	$44,272.05	$19,244.06	$63,516.11
Judge Evans	$49,620.85	$19,479.27	$69,100.13
Judge Hatter, Jr.	$55,989.64	$19,502.13	$75,491.77
Judge McNamara	$55,989.64	$19,502.13	$75,491.77
Judge Mentz	$32,453.28	$17,594.16	$50,047.44
Judge Mihm	$55,989.64	$19,502.13	$75,491.77
Judge Owens	$46,136.88	$19,332.95	$65,469.83
Judge Pregerson	$56,415.80	$19,535.41	$75,951.21
Judge Ramirez	$19,478.06	$14,244.45	$33,722.51
Judge Roettger	$55,989.64	$19,502.13	$75,491.77
Judge Wilhoit	$55,989.64	$19,502.13	$75,491.77
Judge Wiseman	$50,003.63	$19,495.35	$69,498.98
Total		$302,484.32	$1,059,675.59

9. Pursuant to 28 U.S.C. § 1746, I declare under the penalty of perjury that the foregoing is true and correct. Executed on this 11th day of November, 1996.

/s/ Thomas Horst

United States' Reply in Support of Its Partial Motion to Dismiss and Cross-Motion for Summary Judgment

D. Even Accepting Plaintiffs' Erroneous Reading Of The Government's Position, Plaintiffs' Recovery Would Be Substantially Less Than The Amounts Claimed

The basic premise of plaintiffs' erroneous reading of the Government's position (Pl. Opp. 9) is that there is an unconstitutional diminution for every year in which there has been no judicial salary increase. Accepting this erroneous premise as true, it does *not* require the conclusion that the *entire* tax imposed for a year when there is no judicial pay increase constitutes an unconstitutional diminution.

The logical consequence of plaintiffs premise is illustrated in the four schedules attached. One set of schedules shows the calculations for district court judges and another set displays the calculations for circuit court judges. And, since the plaintiffs and defendant disagree as to whether plaintiffs' recovery is limited to the OASDI tax only, or comprehends the HI tax which funds Medicare as well, both alternative calculations are presented. Since the methodology of all four schedules is the same, we will discuss the calculations on Schedule A, "Annual Pay Increases and OASDI Tax Increases—District Court Judges 1984-1996."

Schedule A demonstrates, with respect to district judges and OASDI taxes, the effect of accepting plaintiffs' contention that the effectuation of a cessation of diminution is analyzed on an annual basis. However, the attached schedule also assumes, contrary to plaintiffs' contentions, that each pay raise offsets prospectively *at least* the amount of the current HI and OASDI taxes. Accepting the Government's position that the pay raise caused the unconstitutional diminution in compensation to cease, then

hypothetically *if* there had been no subsequent tax increase and *if* there had been no subsequent pay raise to date, the 1984 "cure" would have meant that there was no further diminution since the same amount of OASDI tax was imposed annually on the same amount of pay to date.

But, of course, there were further increases both in compensation and in OASDI tax. As the schedule demonstrates, in each of the years 1984-1985, 1987, and 1990-1993, the pay raises vastly exceeded increases in the then applicable OASDI taxes. *The only* years when there were no pay raises were 1986, 1988, 1989, and 1994-1996. However, any diminution for 1986 could be no greater than the *increase* of OASDI taxes over the OASDI tax for the prior year which had been offset by the 1985 pay raise, just as the OASDI tax for 1984 of $2,041.20 had been offset by the $2,900 1984 pay raise.[11] The 1985 pay increase of $2,700 (from $76,000 to $78,700) more than offset the $216 increase in OASDI tax from $2,041.20 in 1984 to $2,257.20 in 1985.

Measuring the diminution accordingly on an annual basis, the first possible diminution occurred in 1986, when there was no pay raise but the OASDI tax increased from $2,257.20 in 1985 to $2,394 in 1986—an increase in tax (or a diminution of compensation, using plaintiffs' misunderstanding of the Government's position) of $136.80.[12]

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[11]The retroactive 1984 pay raise caused the diminution to cease effective February 1984, and did not cure the diminution effected by the imposition of the tax in January 1984 on 1983 compensation. Since, however, any diminution in the years in which there was no pay increase would consist of only the *increase in tax for those years*, all of the increase would constitute a diminution for those years.

[12]This diminution was then cured by the 1987 pay raises. However, there was then a diminution on this theory of $230.40 for 1988, and another current diminution for 1989 of $181.80, making the cumulative diminution for 1989 a total of $412.20. This diminution was then cured by the 1990-1993 pay increases, but the absence of pay raises for 1994-1996 resulted in diminutions for those years.

In schedular form, the pattern and amount of these diminutions in compensation in the years without pay raises were as follows:

Year	Diminution for current year not cured by current pay increase	Cumulative diminution for all years not cured by current pay increases [13]
1986	$136.80	$136.80
1988	230.40	230.40
1989	181.80	412.20
1994	186.00	186.00
1995	37.20	223.20
1996	93.00	316.20
Plus Jan. 1984 diminution		$328.95
Cumulative total		$1,833.75

Of course, the cumulative pay increases from 1984 through 1996 were very much greater. The total cumulative diminution, on this basis, as set out on Schedules A, B, C, and D, are as follows:

Schedule A	Annual Pay Increases and OASDI Tax Increases District Court Judges 1984 - 1996	$1,833.75
Schedule B	Annual Pay Increases and FICA Tax Increases District Court Judges 1984 - 1996	$2,080.52
Schedule C	Annual Pay Increases and OASDI Tax Increases Circuit Court Judges 1984 - 1996	$1,955.25
Schedule D	Annual Pay Increases and FICA Tax Increases Circuit Court Judges 1984 - 1996	$2,410.54

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[13]Assuming that each annual FICA tax increase must be offset by an equal or greater pay increases for that year the absence of a current pay increase in two or more successive years means that the diminution in each succeeding (non-pay raise) year is the total of all increases in FICA tax since the last judicial pay raise.

SCHEDULE A

Annual Pay Increases and OASDI Tax Increases - District Court Judges 1984-1996

(1) Date	(2) Pay Subsequent to Date	(3) Pay Prior to Date	(4) Current Pay Increase (2) - (3)	(5) OASDI Tax Subsequent to Date	(6) OASDI Tax Prior to Date	(7) Current OASDI Tax Increase (5) - (6)	(8) Excess of Current Pay Increase (Col. 4) over current OASDI Increase (Col. 7)	(9) "Deficiency" of Current Pay Increase (Col. 4) over Current OASDI Tax Increase (Col.7)	(10) Cumulative Current "Deficiency, not cured by Current pay Increase
1/1/1984	76,000	73,100	2,900	2,041.20	--	2,041.20	858.80	--	(328.95)*/
1/1/1985	78,700	76,000	2,700	2,257.20	2,041.20	216.00	2,484	--	--
1/1/1986	78,700	78,700	--	2,394	2,257.20	136.80	--	(136.80)	(136.80)
1/1/1987 3/1/1987	81,100 89,500	78,700 81,100	2,400 8,400	-- 2,496.60	-- 2,394	-- 102.60	-- 10,897.40	-- --	--
1988	89,500	89,500	--	2,727	2,496.60	230.40	--	(230.40)	(230.40)
1989	89,500	89,500	--	2,908.80	2,727	181.80	--	(181.80)	(412.20)
2/1/1990	96,600	89,500	7,100	3,180.60	2,908.80	271.80	6,828.20	--	--
1/1/1991	125,100	96,600	28,500	3,310.80	3,180.60	130.20	28,369.80	--	--
1/1/1992	129,500	125,100	4,400	3,441	3,310.80	130.20	4,269.80	--	--
1/1/1993	133,600	129,500	4,100	3,571.20	3,441	130.20	3,969.80	--	--
1994	133,600	133,600	--	3,757.20	3,571.20	186.00	--	(186.00)	(186.00)
1995	133,600	133,600	--	3,794.40	3,757.20	37.20	--	(37.20)	(223.20)
1996	133,600	133,600	--	3,887.40	3,794.40	93.00	--	(93.00)	(316.20)
Cumulative Total Col 10									(1,833.75)

* Although, as Col. 9 sets out, for 1984 there was no deficiency of Current Pay Increase over Current OASDI Increase, Col. 10 for 1984 includes the diminution of 1983 compensation paid in January 1984 not cured by the retroactive pay increase. Defs. Proposed Findings 8.

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SCHEDULE B

Annual Pay Increases and FICA Tax Increases - District Court Judges 1984-1996

(1) Date	(2) Pay Subsequent to Date	(3) Pay Prior to Date	(4) Current Pay Increase (2) - (3)	(5) FICA Tax Subsequent to Date	(6) FICA Tax Prior to Date	(7) Current FICA Tax Increase (5) - (6)	(8) Excess of Current Pay Increase (Col. 4) over current FICA Increase (Col. 7)	(9) "Deficiency" of Current Pay Increase (Col. 4) over Current FICA Tax Increase (Col. 7)	(10) Cumulative Current "Deficiency, not cured by Current pay Increase
1/1/1984	76,000	73,100	2,900	2,532.60	464.10	2,068.50	831.50	--	(408.14) */
1/1/1985	78,700	76,000	2,700	2,791.80	2,532.60	259.20	2,440.80	--	--
1/1/1986	78,700	78,700	--	3,003	2,791.80	211.20	--	(211.20)	(211.20)
1/1/1987 3/1/1987	81,100 89,500	78,700 81,100	2,400 8,400	-- 3,131.70	-- 3,003	-- 128.70	-- 10,671.30	--	--
1988	89,500	89,500	--	3,379.50	3,131.70	247.80	--	(247.80)	(247.80)
1989	89,500	89,500	--	3,604.80	3,379.50	225.30	--	(225.30)	(473.10)
2/1/1990	96,600	89,500	7,100	3,924.45	3,604.80	319.65	6,780.35	--	--
1/1/1991	125,100	96,600	28,500	5,090.29	3,924.45	1,165.84	27,334.16	--	--
1/1/1992	129,300	125,100	4,400	5,313.44	5,090.29	223.15	4,176.85	--	--
1/1/1993	133,600	129,500	4,100	5,503.42	5,313.44	189.98	3,910.02	--	--
1994	133,600	133,600	--	5,694.38	5,503.42	190.96	--	(190.96)	(190.96)
1995	133,600	133,600	--	5,731.58	5,694.38	37.20	--	(37.20)	(228.16)
1996	133,600	133,600	--	5,824.58	5,731.58	93.00	--	(93.00)	(321.16)
Cumulative Total Col. 10									(2,080.52)

* This chart assumes that recovery of the 1983 III tax is barred by limitations. Although, as Col. 9 sets out for 1984, there was no deficiency of Current Pay Increase over Current FICA Increase, Col. 10 for 1984 includes the diminution of 1983 compensation paid in January 1984 not cured by the retroactive pay increase. Defi. Proposed Findings 8.

SCHEDULE C

Annual Pay Increases and OASDI Tax Increases -Circuit Court Judges 1984-1996

(1) Date	(2) Pay Subsequent to Date	(3) Pay Prior to Date	(4) Current Pay Increase (2) - (3)	(5) OASDI Tax Subsequent to Date	(6) OASDI Tax Prior to Date	(7) Current OASDI Tax Increase (5) (6)	(8) Excess of Current Pay Increase (Col. 4) over current OASDI Increase (Col. 7)	(9) "Deficiency" of Current Pay Increase (Col. 4) over Current OASDI Tax Increase (Col. 7)	(10) Cumulative Current "Deficiency, not cured by Current pay Increase
1/1/1984	80,400	77,300	3,100	2,041.20	–	2,041.20	1,058.80	–	(347.85) */
1/1/1985	83,200	80,400	2,800	2,237.20	2,041.20	216	2,584	–	–
1/1/1986	83,200	83,200	--	2,394	2,257.20	136.80	–	(136.80)	(136.80)
1/1/1987 2/1/1987	85,700 95,000	83,200 85,700	2,500 9,300	– 2,496.60	-- 2,394	-- 102.60	– 11,697.40	(102.60)	(102.60)
1988	95,000	95,000	--	2,727	2,496.60	220.40	--	(220.40)	(220.40)
1989	95,000	95,000	--	2,908.80	2,727	181.80	--	(181.80)	(412.20)
2/1/1990	102,300	95,000	7,300	3,180.60	2,908.80	271.80	7,228.20	–	–
1/1/1991	132,700	102,300	30,200	3,310.80	3,180.60	130.20	30,069.80	--	–
1/1/1992	137,300	132,700	4,600	3,441	3,310.80	130.20	4,469.80	--	–
1/1/1993	141,700	137,300	4,400	3,571.20	3,441	130.20	4,269.80	--	–
1994	141,700	141,700	--	3,757.20	3,571.20	186	--	(186.00)	(186.00)
1995	141,700	141,700	–	3,794.40	3,757.20	37.20	-	(37.20)	(223.20)
1996	141,700	141,700	--	3,887.40	3,794.40	93.00	–	(93.00)	(316.20)
Cumulative Total Col. 10									(1,955.25)

* Although, as Col. 9 sets out for 1984, there was no deficiency of Current Pay Increase over Current OASDI Increase, Col. 10 for 1984 includes the diminution of 1983 compensation paid in January 1984 not cured by the retroactive pay increase. Deft. Proposed Findings 9.

SCHEDULE D

Annual Pay Increases and FICA Tax Increases -Circuit Court Judges 1984-1996

(1) Date	(2) Pay Subsequent to Date	(3) Pay Prior to Date	(4) Current Pay Increase (2) - (3)	(5) FICA Tax Subsequent to Date	(6) FICA Tax Prior to Date	(7) Current FICA Tax Increase (5) - (6)	(8) Excess of Current Pay Increase (Col. 4) over current FICA Increase (Col. 7)	(9) "Deficiency" of Current Pay Increase (Col. 4) over Current FICA Tax Increase (Col. 7)	(10) Cumulative Current "Deficiency, not cured by Current pay Increase
1/1/1984	80,400	77,300	3,100	2,532.60	464.10	2,068.50	1,031.50	--	(431.59) */
1/1/1985	83,200	80,400	2,800	2,791.80	2,532.60	259.20	2,540.80	--	--
1/1/1986	83,200	83,200	--	3,003	2,791.80	211.20	--	(211.20)	(211.20)
1/1/1987 3/1/1987	85,700 95,000	83,200 85,700	2,500 9,300	-- 3,131.70	-- 3,003	-- 128.70	-- 11,671.30	--	--
1988	95,000	95,000	--	3,379.50	3,131.70	247.80	--	(247.80)	(247.80)
1989	95,000	95,000	--	3,604.80	3,379.50	225.30	--	(255.30)	(503.10)
2/1/1990	102,500	95,000	7,500	3,924.45	3,604.80	319.65	7,180.35	--	--
1/1/1991	132,700	102,500	30,200	5,198.49	3,924.45	1,274.04	28,925.96	--	--
1/1/1992	137,300	132,700	4,600	5,328.90	5,198.49	130.41	4,469.59	--	--
1/1/1993	141,700	137,300	4,400	5,528.70	5,328.90	199.80	4,200.20	--	--
1994	141,700	141,700	--	5,811.85	5,528.70	283.15	--	(283.15)	(283.15)
1995	141,700	141,700	--	5,849.05	5,811.85	37.20	--	(37.20)	(320.35)
1996	141,700	141,700	--	5,942.05	5,849.05	93.00	--	(93.00)	(413.35)
Cumulative Total Col. 10									(2,410.54)

* This chart assumes that recovery of the 1983 III tax is barred by limitations. Although, as Col. 9 sets out for 1984, there was no deficiency of Current Pay Increase over Current FICA Increase, Col. 10 for 1984 includes the diminution of 1983 compensation paid in January 1984 not cured by the retroactive pay increase. Defl. Proposed Findings 9.

Supreme Court of the United States

No. 99 -1978
United States, Petitioner

v.

Terry J. Hatter, Jr., Judge, United States District Court for the Central District of California, et al.

ORDER ALLOWING CERTIORARI.
Filed October 16, 2000.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Federal Circuit is granted.

October 16, 2000

Justice Stevens and Justice O'Connor took no part in the consideration or decision of this petition.